89-511

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

PATRICIA KWALLEK,

Petitioner,

vs.

ROGER ENDELL, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, and HAROLD BROWN, ATTORNEY GENERAL OF THE STATE OF ALASKA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In a first degree murder case, the prosecution violates *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Miranda v. Arizona*, 384 U.S. 436 (1966), by introducing at trial, over the defendant's objections, evidence that after being given *Miranda* warnings the defendant repeatedly invoked her right to silence.

Is the resulting constitutional error harmless beyond a reasonable doubt, where:

1.) The evidence suggests to the jury that the defendant asserted her right to silence out of a consciousness of guilt?

2.) No curative instruction is given by the trial court?

3.) There are no eyewitnesses to the crime; the prosecution's case rests entirely on circumstantial evidence; and evidence is presented that the victim may have been killed by someone else?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The MEMORANDUM OPINION AND JUDGMENT of the Alaska Court of Appeals, affirming Patricia Kwallek's conviction for first-degree murder, was issued on July 24, 1985. The OPINION has not been officially reported and is reproduced at Appendix D. The Alaska Supreme Court's ORDER denying Mrs. Kwallek's PETITION FOR HEARING was entered on November 4, 1985. The ORDER has not been officially reported and is reproduced at Appendix F. The ORDER of this court, denying Mrs. Kwallek's PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS FOR THE STATE OF ALASKA, is reported at 475 U.S. 108 (1986). The Federal Magistrate's REPORT AND RECOMMENDATION TO GRANT PETITION FOR *HABEAS CORPUS* was submitted on May 2, 1988. The REPORT has not been officially reported and is reproduced at Appendix C. The Federal District Court's ORDER, accepting the Magistrate's recommendation, was entered on June 10, 1988. The ORDER has not been officially reported and is reproduced at Appendix B. The MEMORANDUM OPINION of the Ninth Circuit Court of Appeals, reversing the District Court, was issued on May 18, 1989. The MEMORANDUM OPINION has not been officially reported and is reproduced at Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered against Mrs. Kwallek on May 18, 1989. (Appendix G.) Mrs. Kwallek's PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* was denied on July 25, 1989. (Appendix H.)

The jurisdiction of this court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

The constitutional provisions, statutes and rules of court involved have been set forth verbatim at Appendix L.

STATEMENT OF THE CASE

Introduction

This is a *habeas corpus* case stemming from the first degree murder conviction of Patricia Kwallek. The underlying issue concerns the admissibility of a statement given by Mrs. Kwallek to two Alaska State Troopers investigating the death of her husband. The United States District Court for the District of Alaska concluded that introducing the statement at trial violated Mrs. Kwallek's federal constitutional right to remain silent and that the resulting prejudice was not harmless beyond a reasonable doubt. On appeal, a divided panel of the Ninth Circuit Court of Appeals reversed, ruling that the constitutional error, if any, in admitting the statement was harmless. By means of this petition, Mrs. Kwallek seeks reversal of the Ninth Circuit decision and an order remanding the case back to the Ninth Circuit for consideration on the merits.

I. Factual Background.

A.) The Parties' Respective Theories of the Case.

In December of 1982, Patricia Kwallek, then a 44-year-old housewife residing in Ketchikan, Alaska, was convicted of murdering her husband. Mr. Kwallek was shot and killed in the front yard of the family residence in June of that year.

There were no witnesses to the shooting. The prosecution attempted to show that the Kwalleks had argued over finances and Mrs. Kwallek shot her husband as he walked from the residence towards his pickup truck. The prosecution's theory was based entirely on circumstantial evidence.

Mrs. Kwallek consistently denied any involvement in the shooting. The defense argued at trial that an unknown male assailant shot and killed Mr. Kwallek during the midst of a heated argument. Neighborhood witnesses testified they overheard two males arguing in the front yard of the Kwallek residence at the time of the shooting. (Tr. 917-924; 698-702; App. 130-137.) The identity of the second male with whom Mr. Kwallek was overheard arguing still remains unknown.

B.) Mrs. Kwallek's Statement to the Troopers.

The day after Mr. Kwallek's death, Mrs. Kwallek was questioned by two State Troopers assigned to the investigation, Sgts. Lown and Glass. Prior to the questioning, Mrs. Kwallek had been taken by the Troopers from the residence of friends with whom she had been staying since her husband's death, to the Kwallek residence – the scene of the shooting. (O.H. Tr. 112-115.)

The questioning began with Sgt. Glass informing Mrs. Kwallek that she was not under arrest. Glass then stated, however, that he did not believe Mrs. Kwallek had been telling the "true story" of what had happened on the morning of the shooting. Mrs. Kwallek responded: "I'll try to help any way I can" and then described the events on the morning of her husband's death. (App. 102-103.) Glass then repeated that "something else may have happened here yesterday" and accused Mrs. Kwallek of knowing "more about it than what you're telling us." (App. 104.)

Sgt. Lown then took over the questioning. Approximately eight minutes after the session began, he told

Mrs. Kwallek that "before we go any further . . . we're obligated to advise you of your constitutional rights." (App. 108.) After reading Mrs. Kwallek the standard *Miranda* warnings, Lown asked her to sign a waiver of rights form. He then repeatedly assured Mrs. Kwallek that she could stop the interview whenever she wanted:

> Q [By Lown]: What I'm going to ask you to do Patsy, is for us to continue talking to you we would like you to sign this particular statement that you understand it and that you're willing to continue to talk to us. Do you understand that?
>
> A [By Mrs. Kwallek]: *Can I still stop then if I want to?*
>
> *Q: Certainly, that's what it says.*
>
> A: *Anytime I want to?*
>
> Q: *Yes, that what, that's what the waiver says.*
>
> A: *Okay.*
>
> (Sounds of writing in the background.)
>
> Q: Okay the time now is 2:00 o'clock p.m., and I'll sign it here as a witness and Sergeant Glass will sign it here, as a witness. Okay, Patsy the reason we do this is because we're required to. It's a requirement in order for us to talk to you, that we advise you of your rights. And you do understand your rights?
>
> A: Right.[1]
>
> [App. 109-110; emphasis added.]

---

[1] The waiver form signed by Mrs. Kwallek states in part: "If you decide to answer questions now without a lawyer present, *you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.*" (ROA 134; emphasis added.)

After several minutes of additional questioning, Sgt. Glass served Mrs. Kwallek with search warrants for the bathrobe she had been wearing on the day of the shooting; a sample of insulation from the attic where the suspected murder weapon had been found; and bank and bookkeeping records concerning the family's financial affairs. He then brought in several investigators from Anchorage who had been waiting outside to conduct the search.[2]

Sgt. Lown later admitted that Mrs. Kwallek had been brought to her house so that the questioning would coincide with the execution of the search warrants. According to Lown, the coordinated timing of the questioning and residence search was part of a pre-conceived plan to "pressure" Mrs. Kwallek into confessing. (O.H. Tr. 83-84.)

After giving copies of the search warrants to Mrs. Kwallek, Sgt. Lown asked if she had any questions. Mrs. Kwallek replied: "I think I should wait and talk with my mom [when she] gets here before I say what to do." (App. 116.) Rather than honor Mrs. Kwallek's request, or seek clarification, Lown and Glass instead began interrogating Mrs. Kwallek more aggressively: confronting her with the fact that the murder weapon had been found in her attic and with evidence of the family's financial problems – the purported motive for the murder. (App. 116-120.) When asked by Lown "What happened to [the money]?,"

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[2] At this point there were five Troopers at the Kwallek residence: Sgts. Glass and Lown questioning Mrs. Kwallek; Sgt. Floethe and Trooper Bullington searching the house; and Sgt. Rogers standing outside. None of Mrs. Kwallek's family or friends were present. (O.H. Tr. 112-115.)

Mrs. Kwallek repeated a second time: "I will talk when my mom gets here, she can help." (App. 120.)

Again ignoring Mrs. Kwallek's attempt to break off questioning, Sgt. Glass doggedly continued interrogating her on family finances until she said for a third time: "I don't know, I just, [when] mom gets here we'll talk about it." (App. 120-121.) The questioning then finally ceased and Mrs. Kwallek was taken to Ketchikan Trooper Headquarters where she was formally arrested on suspicion of first-degree murder. (O.H. Tr. 62-65.)

II. Procedural History.

A.) Before the State Trial Court.

Mrs. Kwallek was indicted for first-degree murder. Prior to trial, she moved to suppress the statement she had given to Sgts. Lown and Glass. (ROA 16-67.) She argued first that the entire statement should be suppressed since it was not preceded by *Miranda* warnings.[3] Alternatively, she requested that the court suppress "that portion of the statement given after the defendant indicated she wanted to break off the interview." (ROA 16.) Both arguments were based upon *Miranda v. Arizona*, 384 U.S. 436 (1966).

The latter argument (which is the only one relevant to this petition) was repeated in Mrs. Kwallek's *Reply Memorandum*: "In any event, the troopers continued to

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[3] The *Miranda* warnings were not given until approximately eight minutes into the questioning. (App. 102, 108.)

question Mrs. Kwallek after she had indicated on several occasions her desire to discontinue the interview. Questions asked and answers given after that point should obviously be stricken." (ROA 155-156.) It was also restated by defense counsel during oral argument on the motion: "And so, as far we're concerned, even if the court finds that the *Miranda* warning wasn't required, any testimony, or any statement given after that first indication by Mrs. Kwallek that she wanted to discontinue the interview, or at least she wanted to talk with her mother, and Sgt. Lown got the impression she wanted to discontinue the interview, that portion should be stricken." (Tr. 142-143.)

An evidentiary hearing was held on the motion. During the hearing, Sgt. Lown freely admitted that he and Sgt. Glass had consciously ignored Mrs. Kwallek's repeated requests to stop the questioning:

> Q [By Mr. Westerburg]: Now, at some point *Mrs. Kwallek, during the interview, indicated that she didn't want to talk anymore, is that correct?*
>
> A [By Sgt. Lown]: *Yes.*
>
> Q: At what point did she first make that indication?
>
> A: *She stated she did not want to talk until after she had talked to her mother.*
>
> Q: Alright, and was that around the time when the other Troopers were coming in to execute the warrants?
>
> A: I believe it was.
>
> Q: *Did you and Sgt. Glass then continue to ask her questions after that point?*

A: *I believe she was asked a few questions, yes.*

Q: Isn't it normal practice that when the subject requests that no more questions be asked . . . or [indicates] that she doesn't want to talk anymore, that the officers are supposed to discontinue questioning?

A: Yes.

Q: *But you nevertheless, you and Sgt. Glass, continued to ask questions after that point?*

A: *We asked her some general questions, yes.*

Q: *And did she, subsequent to that first – after she first made an indication she didn't want to talk anymore, or she wanted to discontinue the questioning, did she repeat it at a later time?*

A: *I think she said it several times.*

Q: *Alright and you and Sgt. Glass, nevertheless, continued to ask her some questions?*

A: *General questions.* [O.H. tr. 75-76; emphasis added.]

Despite this testimony, the trial court denied the motion to suppress. The court suggested that Mrs. Kwallek's assertion of her rights may have been equivocal. Nevertheless, it assumed that Mrs. Kwellek had invoked her right to silence because she wanted to speak with her mother about whether or not to continue with the interview. The trial judge concluded, however, that it "really didn't make any difference" why she wanted to stop the interview because he did not consider the statement sufficiently incriminating to warrant suppressing. (Tr. 158-159; App. 127-129.)

The court concluded, alternatively, that Mrs. Kwallek had not been in custody during questioning and therefore

Miranda could not have been violated by the Troopers. (Tr. 160; App. 128-129.)

The case proceeded to trial and Mrs. Kwallek repeated her objections to the interview transcript when it was offered by the State as a trial exhibit. The objection was noted and overruled. (Tr. 327.) Sgt. Lown testified concerning Mrs. Kwallek's statement, and Mrs. Kwallek's desire to break off questioning, during his direct examination:

> Q [Prosecutor]: Okay. When did they [the other Troopers] come in, at the end of the interview?
>
> A [By Sgt. Lown]: Towards the end.
>
> Q: All right. *What prompted that*?
>
> A: *Patsy did not want to talk anymore*. She wanted to wait 'til her mother arrived, and I believe it was about that point that I gave her a copy of the search warrant that we had. [Tr. 325-326; emphasis added.]

Mrs. Kwallek was later convicted of first-degree murder. She was sentenced to thirty years imprisonment. (App. 100.)

B.) Appeal to the Alaska Court of Appeals.

Mrs. Kwallek appealed her conviction to the Alaska Court of Appeals. She repeated the argument that her Fifth Amendment rights had been violated and that the statement should have been suppressed. As further support for her position, she argued that the statement constituted an impermissible comment on her right to remain silent under *Doyle v. Ohio*, 426 U.S. 610 (1976). (*Opening Brief* at 96-113; *Reply Brief* at 53-59.)

Mrs. Kwallek's appeal was resolved in an unreported *per curiam* opinion. In approaching the *Miranda* issue, the court "assumed" – contrary to the finding of the trial court – that by the time Mrs. Kwallek first invoked her right to remain silent, she was in a custodial setting. Accordingly, *Miranda* applied and the Troopers were obligated to honor any requests to remain silent:

> She [Mrs. Kwallek] maintains that by the time she made the initial request to wait for her mother, a significant amount of time had elapsed. During this time, the interrogation had intensified and the Troopers had disclosed their belief that Kwallek was a suspect and was not telling the truth. She had also been formally advised of her *Miranda* rights. Two additional uniformed Troopers had entered Kwallek's home to execute search warrants, and copies of the warrants were served on Kwallek in a manner calculated to enhance the possibility of a confession. *In considering the supression issue it is assumed, without being decided, that Kwallek's argument with respect to the custodial nature of her interrogation is correct.* [App. 77-78, n.14; emphasis added.]

Continuing with the *Miranda* analysis, the court ruled that Mrs. Kwallek's first request for her mother ("No I think I should wait and talk with my mom [when she] gets here before I say what to do") was not an unequivocal assertion of her Fifth Amendment rights but that her second statement ("I will talk when my mom gets here, she can help") was sufficiently clear to constitute an assertion.

The court agreed that all dialogue after the second request should have been suppressed but concluded that this latter portion of the transcript was not incriminating

and any error in presenting it to the jury was therefore harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). (App. 79-80.)

The court determined that the *Doyle v. Ohio* "impermissible comment on exercise of *Miranda* rights" issue was distinct from Mrs. Kwallek's *Miranda* argument and had not been preserved at the trial level. Nevertheless, the court considered the merits of the argument under Alaska's "plain error" rule, Alaska Rule of Criminal Procedure 47(b). (App. 80-82; 126.)

In conducting its plain error analysis, the court determined, as a matter of law, that the State was permitted to show the jury that Mrs. Kwallek wanted to talk with her mother before making further statements. Relying on two federal decisions, *United States v. Williams*, 556 F.2d 65 (D.C. Cir. 1977), *cert. den.*, 431 U.S. 972 (1977) and *United States v. Haro-Portillo*, 531 F.2d 962 (9th Cir. 1976), the court found the evidence necessary "to provide the jury with an explanation for the abrupt termination of the interview, which would otherwise have been inexplicable." (App. 80.) The court also opined that the assertions were not really refusals to speak, but instead, were only "requests to delay further questioning . . . " and presenting them to the jury, therefore, was not improper. (App. 81.)

The court concluded that there was no "realistic likelihood that the jury placed appreciable weight on the challenged statements as evidence of Kwallek's consciousness of guilt" and that any error in presenting the transcript to the jury could not have been "obviously prejudicial" to Mrs. Kwallek. (App. 81.)

Chief Judge Bryner dissented. He concluded that Mrs. Kwallek's first request to stop the interrogation constituted an unequivocal assertion of her right to remain silent. He also disagreed with the majority's conclusion that admission of the statement constituted harmless error. He agreed that much of the substantive information provided by Mrs. Kwallek during the interview was cumulative. However, his concern was with the *context* in which Mrs. Kwallek had asserted her rights:

> *Yet far more damaging to Kwallek than anything she said was what she did not say. The admission into evidence of the illegally obtained portions of Kwallek's interview disclosed to the jury two separate instances in which Kwallek, when pressed for potentially incriminating details, ceased being cooperative and asserted her right to silence.* The unmistakable and in all likelihood indelible impression created by this evidence is that Kwallek had something to hide – that her refusal to speak was motivated by the consciousness of her own guilt. [App. 90; emphasis added.]

C.) Petition for Hearing to the Alaska Supreme Court.

Mrs. Kwallek timely filed a petition for hearing with the Alaska Supreme Court. She repeated her arguments that her Fifth Amendment rights under *Doyle* and *Miranda* had been violated by the State's use of the interview transcript at trial. (*Petition for Hearing* at 1-4.) The petition was denied without opinion over the dissents of Chief Justice Rabinowitz and Justice Moore who would have granted the petition "as to the issue of failure to

break off questioning when requested to do so." (App. 94-95.)

D.) *Habeas* Proceedings Before the Federal District Court.

After exhausting her state appeals and unsuccessfully petitioning for a writ of *certiorari* with this Court (*Kwallek v. State*, 475 U.S. 1108 (1986)), Mrs. Kwallek filed a petition for writ of *habeas corpus* with the Federal District Court for the District of Alaska. Jurisdiction was invoked under 28 U.S.C. § 2254. The matter was submitted to Magistrate Matthew Jamin for consideration and recommendation.

In a scholarly REPORT AND RECOMMENDATION TO GRANT PETITION FOR *HABEAS CORPUS* (App. 18), Magistrate Jamin carefully examined the evidence and determined not only that Mrs. Kwallek's right to silence had been violated, but in addition, that the violation had been part of a "deliberate plan [by the Troopers] to pressure a confession out of Kwallek [inconsistent] with solicitude for Kwallek's Fifth and Sixth Amendment rights . . . ". (App. 44.)

The magistrate then analyzed the improperly admitted evidence; how it was used at trial; the circumstantial nature of the prosecution's case; the fact that the defendant "did present a defense with believable elements"; the trial judge's observation that certain evidence was "pretty skimpy;" and concluded that the error in admitting the improperly obtained statement was not harmless beyond a reasonable doubt. (App. 44-48.)

District Court Judge H. Russel Holland issued a separate opinion accepting the magistrate's recommendation. (App. 9.) Regarding custody, he concluded that "the Alaska trial court's factual determination as regards petitioner's custodial situation is not fairly supported by the record." (App. 11.) He also agreed with Magistrate Jamin that the state courts had "employed an incorrect legal standard in evaluating petitioner's first request for the presence of her mother . . . " (App. 14.)

The court concluded that the Troopers' failure to clarify the nature and extent of Mrs. Kwallek's request to speak with her mother, "like their similar ignoring of petitioner's second such request and the strategic execution of the search warrant, were all part of a calculated plan to pressure petitioner into changing her story." (App. 15.)

With respect to the *Doyle* issue, the court concurred in the magistrate's conclusion that a violation had occurred and "that petitioner sufficiently raised to the trial court, and the appellate court in fact considered, the merits of the question of whether or not the transcript of petitioner's interview should be redacted so as to delete questions and answers concerning her right to remain silent." Accordingly, there was no procedural impediment to federal *habeas* review of the *Doyle* claim. (App. 16.)

Finally, the court determined that the trial court error was not harmless beyond a reasonable doubt. It distinguished *United States v. Haro-Portillo*, and *United States v. Williams*, relied upon by the State and the Alaska Court of Appeals, by emphasizing:

> *[T]he interview transcript as placed before the jury contained not one but all three requests by the petitioner that she not be required to talk further.* This is not a case where an otherwise admissible interview is concluded by a single neutral statement by the witness terminating the interview. [App. 16; emphasis added.]

Judgment was entered by the District Court in favor of Mrs. Kwallek on June 13, 1988. (App. 98.)

E.) Appeal to the Ninth Circuit.

The State appealed to the Ninth Circuit Court of Appeals, raising a number of substantive and procedural objections to the District Court's actions. A divided panel of the Ninth Circuit reversed the District Court and reinstated Mrs. Kwallek's conviction.

The majority on the panel avoided the merits of the case by concluding in an abbreviated Memorandum Opinion that any error in exposing the jury to evidence that Mrs. Kwallek had repeatedly attempted to exercise her right to silence was harmless. (App. 2-4.) The majority relied largely on the same harmless error analysis used by the Alaska Court of Appeals.

Judge Reinhardt dissented. Consistent with the approach of District Court Judge Holland, Magistrate Jamin and Chief Judge Bryner, Judge Reinhardt focussed on the *context* in which Mrs. Kwallek attempted to stop the questioning:

> It is not merely that [Mr.] Kwallek had recently "died" that might have motivated his widow to ask the troopers to stop questioning her; it is that –

> as the troopers freely admitted and as the interview unequivocally demonstrated to the jury – *she knew that they thought she had killed her husband*. It requires no great imagination, the majority's disposition notwithstanding, to conclude that the jury, already aware that Kwallek was the prime suspect by the time the interview began, may very likely have looked on her repeated requests to stop answering questions as something far more insidious than her expression of a desire for "the support of a family member." [App. 7; emphasis in original.]

Rejecting "out of hand" the majority's conclusion that Mrs. Kwallek would have been convicted even without the challenged evidence, Judge Reinhardt stressed that the prosecution was "founded on circumstantial evidence, conjecture, and the State's desire to have the jury disbelieve Ms. Kwallek's story." He then concluded:

> In such a case, testimony about motive (a subject discussed at length in the interview which Ms. Kwallek seeks to suppress), or testimony (such as three requests to stop answering police questions) that might have made the defendant appear evasive or less than forthright with the troopers could be especially damning. [App. 8.]

Mrs. Kwallek petitioned the court to rehear the case but the petition was denied by a 2-1 vote. (App. 97.)

This petition follows.

ARGUMENT

I. EXPOSING THE JURY TO EVIDENCE THAT MRS. KWALLEK REPEATEDLY INVOKED HER RIGHT TO SILENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Ninth Circuit found that Mrs. Kwallek was not prejudiced by the jury's consideration of the unedited June 25, 1982 transcript and her many requests to remain silent contained therein. In order to appreciate the effect of the error in admitting the statement, and the resulting prejudice to Mrs. Kwallek, it is important to bear in mind the circumstantial nature of the State's case and the factual basis for Mrs. Kwallek's defense.[4]

Mrs. Kwallek does not know who killed her husband. She believes he was shot by an unknown male assailant with whom he was heard arguing at the time the shooting took place. The argument was overheard by two disinterested neighbors, Steve Neitzke and Luann Cottle.

On the morning of the shooting, Mr. Neitzke was startled awake by the "screeching and screaming of an obviously terrorized female." The sound of the screaming woman was accompanied by two men shouting at one another. The two male voices were differently pitched and their words were overlapping. "It was clearly distinguishable as two men shouting at each other or at something else." Initially, the tone of both male voices was that

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[4] Inasmuch as the merits of the underlying constitutional and procedural issues raised by the parties below were not addressed in the Ninth Circuit opinion, they will not be discussed in this petition. The only issue here concerns the correctness of the Ninth Circuit's decision on the harmless error question.

of anger. Shortly thereafter, however, the sound of one voice changed to a pleading or begging quality. Seconds later, two shots were fired. With the shooting, all noise stopped. (Tr. 919-920; App. 130-134.)

Thirty to forty-five seconds after the first two shots, Neitzke heard a second volley of three shots. He was standing near an open window and concluded that the shots had come from the direction of the Kwallek residence – where he had heard the arguing seconds earlier. (Tr. 919-924; App. 130-134.)

Luann Cottle was another neighbor of the Kwalleks. On the morning of the shooting, she heard three shots coming from the direction of the Kwallek residence and then a male voice shouting: "What are you doing, I haven't done anything." A *second* male voice then said: "What's going on here?" Two more shots were fired. Her bedroom window was open and the sounds were "fairly clear." (Tr. 698-702; App. 134-137.)

There were no eye witnesses to the shooting. Mrs. Kwallek consistently and vehemently denied any participation. Much of Mrs. Kwallek's pre-trial investigation was directed at identifying the man with whom Mr. Kwallek was heard arguing at the time he was shot. The man was never identified.

The State's case was based largely on theory and conjecture. The State theorized that Mrs. Kwallek shot her husband during an argument over finances. However, virtually no evidence was presented that the Kwalleks were having serious marital difficulties. In fact, the evidence was to the contrary. (Tr. 464-465; 478; 543-544; 757;

768; 784; 829; 906; 914; 951; 954; 957; 967; 971; 974; 987; 1008-1009; 1011-1012; 1014; 1017; 1022; 1025-1026.)

Neighborhood friends visited the Kwalleks the evening before the shooting and detected nothing out of the ordinary. (Tr. 543-544.) Mrs. Jenck, a close friend of Mrs. Kwallek, spoke with her approximately one-half hour before the shooting, made plans for a lunch date that afternoon, and detected nothing out of the ordinary. (Tr. 475.)

According to the early statements of a Mrs. White, another friend of the Kwalleks, she had also spoken with Mrs. Kwallek over the telephone shortly before the shooting and detected nothing out of the ordinary. In fact, Mrs. Kwallek had gone so far as to invite Mrs. White over for coffee *only minutes before the shooting*. Mr. Kwallek was shot during the few minutes it took for Mrs. White to drive to the Kwalleks. By the time she arrived, Mr. Kwallek was being attended by EMT's. (Tr. 546-555.)[5]

There was no corroborating evidence that the Kwalleks had been quarreling on the morning of the shooting. (Tr. 344-345.) Indeed, from all indications, June 24th had been a "typical" morning at the Kwallek residence. Coffee cups and orange juice glasses were found in the sink. The lunch Mrs. Kwallek had packed for her husband was found near his body, as was a spilled cup of coffee he was carrying as he walked towards his pickup truck. (Tr. 344-345.)

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[5] Mrs. White later inexplicably recanted her earlier statements.

The spent shell casings from the murder weapon were found on the left side of a fuel oil tank stand apparently used by the shooter as a brace. (Tr. 341.) If Mrs. Kwallek, a left-handed person, had used the stand as a brace, the casings would have been found on the opposite side.

Lead residue was found on Mrs. Kwallek's robe but it could have been picked up in the Kwalleks' messy shotgun shell reloading room where bags of lead were stored. (Tr. 873-876.) Further, the lead residue pattern on the robe was markedly different from the pattern left on test paper after a test firing of the weapon. (Tr. 418-443; 448.) More importantly, when the robe was tested for the presence of nitrites (which would have indicated the presence of exploded gun powder) the test results were negative, casting further doubt on the State's assertion that the lead residue on the robe was from the discharge of a weapon. (Tr. 415-417; 446.)

The suspected murder weapon was found in the Kwallek attic. However, long before the gun was found, Mrs. Kwallek had reported to the Troopers and others hearing a strange "creaky" sound in another part of the house when she phoned the EMT's after discovering her wounded husband outside. Her dog was barking in the same portion of the house. Entrance to the Kwallek attic is secured by a set of collapsible stairs which makes a "creaky" sound when pulled down from overhead. (Tr. 355; 595-596; 785-786; 977; 989-990.)

Complicating Mrs. Kwallek's defense was the shoddy investigation conducted by the Troopers. A prompt gunshot residue test was not performed on Mrs. Kwallek.

Fingerprint evidence on the murder weapon was not properly preserved. A bloody palm print on the Kwallek pickup truck, near the body, was also not preserved. The poor investigation was emphasized at trial and made a significant part of Mrs. Kwallek's defense. (Tr. 295; 348-351; 580-582; 587-593; 837-839.) The Alaska Court of Appeals agreed that the cumulative effect of the investigative errors by the Troopers presented a "close question" as to whether Mrs. Kwallek's Due Process rights had been violated. (App. 66, n.11.)

Finally, at the time of the shooting, Mrs. Kwallek was a forty-four-year-old housewife with no prior criminal record or history of violence. She seemed an unlikely murderer.

In light of the circumstantial nature of the State's evidence; the testimony of Mr. Neitzke and Mrs. Cottle confirming the presence of a second male with whom Mr. Kwallek was heard arguing at the time he was shot; and the other factors discussed above casting doubt on Mrs. Kwallek's guilt, the trial took on the nature of a classic "whodunit."

As in any "whodunit," the credibility of the defendant was critical. Mrs. Kwallek adamantly denied killing her husband. However, as explained above, the State was permitted to introduce considerable evidence demonstrating that at a critical point in the Troopers' investigation, Mrs. Kwallek became uncooperative; refused to answer additional questions; and repeatedly exercised her right to remain silent. Since the trial court found the

evidence admissible, no curative instruction was given.[6] The effect on Mrs. Kwallek's case was devastating. As recognized by Chief Judge Bryner in his dissent:

> Kwallek's case was an extremely close one. Almost all of the State's evidence against Kwallek was circumstantial. The State showed a possible motive and a clear opportunity, but there was little evidence to implicate Kwallek directly. In the face of the State's evidence, Kwallek, from the inception of the investigation through the conclusion of her trial, steadfastly and consistently maintained her innocence. With one exception, she had always appeared forthright and willing to cooperate. The sole exception was her refusal to speak with Sgts. Lown and Glass during the June 25 interview.
>
> Because the trial court admitted those portions of the June 25 statement that were obtained in violation of Kwallek's right to silence, *the jury heard three successive instances in which Kwallek refused to speak. In practical terms, the impact of this evidence could readily have been devastating.* [App. 91-92; emphasis added.]

The trial judge also recognized that the case was a close one and commented in a post-trial hearing that the evidence as to what had happened on the morning of the shooting was "pretty skimpy." (Tr. 1128-1129.)

In light of the foregoing, the District Court had little choice but to conclude that the trial court's error in admitting the June 25th transcript was not harmless beyond a reasonable doubt. The Ninth Circuit's unfortunate decision to the contrary simply does not square with the magnitude of the error and closeness of the case.

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[6] *Compare*: *Greer v. Miller*, 483 U.S. 756 (1987) (prompt curative instruction negates *Doyle* violation).

II. COMPELLING REASONS JUSTIFY GRANTING REVIEW.

A. The Ninth Circuit Opinion Conflicts With Prior Decisions of This Court.

In *Chapman v. California*, 368 U.S. 18 (1966), another case involving prosecutorial comment on a defendant's right to silence, this court held that for constitutional error to be harmless: "[T]he court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Id.* at 24.)

In conducting its harmless error analysis, the *Chapman* court recognized that the prosecution had presented a "reasonably strong 'circumstantial web of evidence'" against the defendants. The observation was an understatement. The evidence in *Chapman* included the following:

> 1.) The defendants and victim were seen leaving a club together shortly before the killing;
>
> 2.) The condition of the club indicated that the victim had been forcibly removed from it by the defendants;
>
> 3.) The murder weapon belonged to one of the defendants and was later found in the possession of another defendant;
>
> 4.) Blood matching the victim's was found in a car belonging to one of the defendants and on the clothing of two other defendants;
>
> 5.) One defendant made nearly a full confession;
>
> 6.) No defense on the merits was offered at trial;

7.) The only defense witness was a psychologist who testified as to one defendant's inability to form the requisite intent because of "disassociative reaction." [*Id.*, *Harlan Diss. Op.* at 54-55.]

Despite the strength of the prosecution's case, the *Chapman* court emphasized the damaging effect of the improper evidence and found the error not to be harmless beyond a reasonable doubt.

For the reasons explained earlier, the State of Alaska's case against Mrs. Kwallek was not nearly so strong or one-sided as the evidence mustered by the State of California in *Chapman*. If the error was not harmless in *Chapman*, the similar error here cannot be categorized, with any intellectual honesty, as harmless. [*See e.g.*, *Fontaine v. California*, 390 U.S. 593, 596 (1968) (where prosecution's case based on circumstantial evidence, prosecutor's reference to defendant's refusal to testify not harmless beyond a reasonable doubt).]

The Ninth Circuit gave little more than lip service to *Chapman*. When the facts of the two cases are compared, the results should be the same: no harmless error.

B. This Case Should Be Used as A Means of Clarifying the Law.

In *Greer v. Miller*, 483 U.S. 756 (1987), this court left open the issue of when a *Doyle* violation can be harmless beyond a reasonable doubt. For several reasons, the instant case presents the court with an excellent opportunity to resolve this issue. First, the case is relatively uncluttered. The Ninth Circuit issued its decision solely

on harmless error grounds. In light of the narrow focus of the Ninth Circuit decision, the myriad of procedural and substantive issues which typically plague *habeas* cases is not present and need not be addressed by the court. Should the court rule in Mrs. Kwallek's favor, the remaining issues in this case can be considered by the Ninth Circuit on remand.

Second, clarification of the law is badly needed as the Circuit Courts have taken varying approaches in analyzing harmless error in *Doyle* cases. For example, as noted by Justice Brennan in *Greer*, the Fourth and Fifth Circuits rarely find *Doyle* violations harmless. *Brennan Conc. Op.* at 772-773.[7]

The First Circuit is also reluctant to find a *Doyle* error harmless. *See e.g. Morgan v. Hall*, 569 F.2d 1161, 1166-69 (1st Cir. 1978), *cert. den.*, 437 U.S. 910 (1978) (curative instruction does not alleviate *Doyle* violation). The Sixth Circuit typically refuses a harmless error finding when the prosecution's evidence is circumstantial. *Tuggle v. Seabold*, 806 F.2d 87, 93 (6th Cir. 1986); *Charles v. Anderson*, 610 F.2d 417, 422-423 (6th Cir. 1979), *rev'd on other grounds*,

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[7] *See e.g., Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980) ("Because the nature of a *Doyle* error is so egregious and so inherently prejudicial reversal is the norm rather than the exception."); *United States v. Meneses*, 580 F.2d 888, 893-896 (5th Cir. 1978) (analysis varies depending on nature of *Doyle* violation; however, where exculpatory story is not "totally implausible" or "transparently frivolous," harmless error unlikely.)

447 U.S. 404 (1980). The Tenth Circuit seems to follow a similar approach. *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985). Thus, if the instant case had been heard by the First, Fourth, Fifth, Sixth or Tenth Circuit, a harmless error finding would have been unlikely.

The Seventh and Eighth Circuits, on the other hand, seem more willing to recognize a *Doyle* error as harmless. *See e.g., Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir. 1988) (even where prosecution's case grounded on circumstantial evidence, *Doyle* error harmless beyond a reasonable doubt); *Hobbs v. Lockhart*, 791 F.2d 125, 129-130 (8th Cir. 1986) (since circumstantial evidence of guilt "overwhelming," *Doyle* error harmless.)

Even within a given circuit, the analysis may vary depending on the panel. In the Ninth Circuit, for example, panels in *Alo v. Olina*, 639 F.2d 466, 469 (9th Cir. 1980) and *Hinman v. McCarthy*, 676 F.2d 343, 350-352 (9th Cir. 1982), *cert. den.*, 459 U.S. 1048 (1982), refused to find harmless error even though the *Doyle* violations were minor and the prosecution had relatively strong circumstantial evidence cases against the accused. In contrast, in the present case, the violation was more significant and the prosecution's case weaker by comparison. Nevertheless, a Ninth Circuit panel considered the violation harmless.

CONCLUSION

Contrary to *Miranda* and *Doyle*, the jury was presented with evidence that in response to criminal accusations, Mrs. Kwallek repeatedly chose to remain silent. Apart from providing the means of correcting an egregious error which tainted a state murder trial, this case presents the court with the ability to develop a uniform harmless error analysis for cases involving prosecutorial comment on a defendant's exercise of the right to silence. One's constitutional right to a fair trial should not depend on the circuit in which the case arises.

For these and the other reasons explained above, Mrs. Kwallek urges that her petition be granted.

DATED this 25th day of September, 1989, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER & CHEROT
Attorneys for Petitioner

BY: DANIEL WESTERBURG

APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA KWALLEK, Petitioner-Appellee, v. ROGER V. ENDELL, Commissioner; HAROLD BROWN, Attorney General of the State of Alaska, Respondents-Appellants.	No. 88-3948 D.C. No. CV-A86-274-HRH MEMORANDUM* (Filed May 18, 1989)

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted February 10, 1989
Seattle, Washington

Before: REINHARDT, KOZINSKI and TROTT, Circuit Judges.

Patricia Kwallek is an Alaska state prisoner. Following her conviction in Alaska Superior Court for the first-degree murder of her husband, Kwallek appealed, first to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

the Alaska Court of Appeals, and then to the Alaska Supreme Court, where she raised numerous evidentiary and constitutional issues. Both courts affirmed her conviction. Kwallek then filed a petition for habeas corpus relief in federal court, alleging that the admission of her pre-arrest statement to two Alaska State Troopers violated her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and constituted an impermissible comment on her assertion of her constitutional right to remain silent. *Doyle v. Ohio*, 426 U.S. 610 (1976). The district court agreed with both of Kwallek's contentions, and held that the resulting prejudice was not harmless beyond a reasonable doubt. Alaska appeals, arguing first that the admission of the statement neither violated Kwallek's *Miranda* rights nor constituted an impermissible comment on her assertion of silence and, alternatively, that in light of the overwhelming evidence, any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). We review the district court's grant of habeas corpus relief de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied*, 109 S. Ct. 250 (1988). Findings of fact underlying the state court's determination of harmless error are afforded the presumption of correctness under 28 U.S.C. § 2254(d) (1982). *Id.*

Discussion

A. We need not consider whether the admission of Kwallek's statement violated her constitutional rights, because we agree with the state appellate court that the error, if any, was harmless. Kwallek said very little during her pre-arrest interview of either an inculpatory or exculpatory nature. The substance of the challenged portions

of the interview, which focused almost exclusively on the Kwalleks' financial difficulties, added nothing that was not already known, or could not have been easily discovered by the prosecution. In fact, Kwallek had already disclosed to investigators in a prior interview much of what she said to the state troopers during the interview in question. No information was conveyed during the interview that was not otherwise available for presentation to the jury.

B. A somewhat closer issue is the admissibility of those portions of the transcript where Kwallek indicates that she wishes to answer no further questions until the arrival of her mother. However, we conclude that any error in admitting this testimony was also harmless. In the first place, Kwallek merely asked to postpone the interview for a short time. Her statement thus does not constitute the type of unequivocal refusal to continue discussions from which a jury might infer guilt. Moreover, Kwallek's request for delay was perfectly plausible under the circumstances: Her husband had suffered a violent death the previous day. It was understandable for her to seek the support of a family member before delving further into the details of the tragedy. While it might have been preferable for the prosecutor to have excised that portion of the transcript, it is highly unlikely that any juror would have inferred consciousness of guilt therefrom.

In any event, the evidence of Kwallek's guilt was strong; the jury would no doubt have convicted her even if Kwallek's conversation with the troopers had been entirely omitted. The rifle which killed Kwallek was found in the attic of the Kwalleks' home shortly after the

shooting. Spent shells from the same rifle were found near the door of the house, some distance from the site of the shooting. A state expert testified that the pattern of gaseous residue on Kwallek's robe was consistent with her having fired the murder weapon, pulling the trigger with the left hand. Kwallek, who is left-handed, is familiar with weapons. The state also presented substantial evidence of motive, including testimony to the effect that the Kwalleks' financial difficulties were a source of considerable marital friction.

Finally, Kwallek's attempt to explain away this mass of circumstantial evidence was patently contrived. There is no plausible reason why the gunman, having shot her husband outside the house with one of the Kwalleks' rifles, would gather up the spent shells and leave them near the door, then go into the house, pull down the attic stairs and hide the weapon in the attic before fleeing without a trace. Similarly unconvincing was Kwallek's contention that the gunshot residue on her house robe was picked up off a table top, as there were no wipe marks on the robe.

In short, the admission of the June 25 transcript was, if error at all, harmless.

REVERSED.

Kwallek v. Endell, No. 88-3948

Reinhardt, J., dissenting:

(Filed May 18, 1989)

My disagreement with the majority is simple. I believe the district court was correct in concluding that the constitutional errors entailed in admitting into evidence Kwallek's interview with the troopers were not harmless. Nothing in the majority's abbreviated discussion persuades me to the contrary. Accordingly, I dissent.

Kwallek's claims are straightforward ones: she claims that the troopers refused to honor her invocation(s) of her right to remain silent, and that the jury improperly learned that she three times requested that the police stop questioning her until the arrival of her mother. The majority holds that any error in introducing a constitutionally proscribed police interview and allowing the jury to hear Ms. Kwallek repeatedly seek to end her interrogation was harmless. I disagree.[1]

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[1] I do not discuss the question whether it was error to admit Kwallek's first request to terminate the interview (although I believe that it was, *see Doyle v. Ohio*, 426 U.S. 610 (1976)), for I believe that the district court's grant of habeas corpus relief can be affirmed merely on the basis of Kwallek's second and third attempts to end the interview. The majority, in an assertion I find plainly baffling, ignores the fact that the Alaska courts assumed, and the State now concedes, that admitting these requests was error. To the majority, the admissibility of these requests represents merely a "closer question." Maj. at 3.

The majority grounds its conclusions that the errors were harmless essentially upon three observations. Each is flawed. Initially, the majority dismisses the *Miranda* error [Maj. at 2-3], in four brief sentences which reduce to one assertion – any information actually "conveyed" by allowing the jury to hear the unconstitutional interview was "otherwise available for presentation to the jury." While this limited assertion may be accurate, it is inadequate to the majority's task, for exclusive focus on the "information" contained in the interview ignores the potential prejudice to Kwallek from the jury's knowledge of the *context* in which the interview occurred. As I emphasize below, harmless error analysis requires something more than the majority's "the jury could have heard facts a, b and c anyway" approach.

When it turns to Kwallek's *Doyle* claim, the "closer question" in this case (*see* n.1), the majority doubles its efforts and offers *two* observations – the first (at best) naive, the second probably inaccurate – to support its "harmless" conclusion. The majority first observes that, because Kwallek's requests for her mother were "perfectly plausible under the circumstances," "it is highly unlikely that any juror would have inferred consciousness of guilt" from the requests. Maj. at 3. Even leaving aside the question whether the majority's "highly unlikely" test is equivalent to the "beyond a reasonable doubt" standard which we must apply to constitutional harmless error analysis, *Chapman v. California*, 386 U.S. 18 (1967), I find this assertion (to put it mildly) unconvincing. First, by looking exclusively at the "violent death the

previous day" of Kwallek's husband, the majority, somewhat disingenuously, focuses on the wrong "circumstances" in evaluating the potential effect on the jury of her requests for delay. It is not merely that "Spade" Kwallek had recently "died" that might have motivated his widow to ask the troopers to stop questioning her; it is that – as the troopers freely admitted and as the interview unequivocally demonstrated to the jury – *she knew that they thought she had killed her husband.* It requires no great imagination, the majority's disposition notwithstanding, to conclude that the jury, already aware that Kwallek was the prime suspect by the time the interview began, may very likely have looked on her repeated requests to stop answering questions as something far more insidious than her expression of a desire for "the support of a family member." Maj. at 3.

I think that this discussion illustrates the fundamental inadequacy of the majority's harmless error analysis. By looking only to the "information" conveyed during the interview, or selecting a few helpful "circumstances," the majority ignores the full context of Kwallek's statements, and of their admission into evidence at her trial; in so doing, the majority fails to address the manner in which the statements reinforced other aspects of the State's case, particularly its desire to have Kwallek appear as something other than a confused or troubled victim of a "tragedy." *Id.* Evaluating the harm of constitutional error without analyzing the logical relationship of the erroneously admitted evidence to the rest of the evidence at trial distorts harmless error analysis and, as here, invites unsound outcomes.

The majority offers a third observation – that the evidence of Kawllek's guilt is so "strong" that the constitutional errors are harmless. *Id.* I am not persuaded by the majority's all too casual characterization of the evidence, and would place more stock in the Alaska trial judge's admission that the actual evidence of what happened on the morning of the shooting was "pretty skimpy." This was a case founded on circumstantial evidence, conjecture, and the State's desire to have the jury disbelieve Ms. Kwallek's story. In such a case, testimony about motive (a subject discussed at length in the interview which Ms. Kwallek seeks to suppress), or testimony (such as three requests to stop answering police questions) that might have made the defendant appear evasive or less than forthright with troopers could be especially damning. I must, then, reject out of hand the majority's conclusory assertion that there is "no doubt" that Kwallek would have been convicted even if her "conversation with the troopers had been entirely omitted [from the trial]." *Id.*

Constitutional error is essentially conceded by the State. The district judge, in my view correctly, concluded that this error was not harmless beyond any reasonable doubt. *See Chapman*, 386 U.S. at 24. Habeas corpus relief was thus properly granted to Mrs. Kwallek. I dissent from the majority's unfortunate holding to the contrary.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

PATRICIA KWALLEK, Petitioner, vs. ROGER V. ENDELL, Commissioner of the Department of Corrections, and HAROLD BROWN, Attorney General of the State of Alaska, Respondents.	No. A86-274 Civil *O R D E R* (Magistrate's Recommendation Accepted) (Filed June 10, 1988)

The above case is before the court on a recommendation from the United States Magistrate that a writ of *habeas corpus* issue in 120 days if petitioner is not retried by state authorities within that time.

The underlying facts and the procedural history of this case are set out at length in the Magistrate's final report and recommendation. The court incorporates the Magistrate's foregoing discussion by reference.

The parties identified, and the United States Magistrate decided, the following issues:

(1) Was petitioner in custody so that her *Miranda* rights must be protected during a police interrogation on June 25, 1982?

(2) Should the interrogation of petitioner have ceased when she first requested the presence of her mother?

(3) If there were error in the admission of petitioner's interview transcript after the first request for the presence of her mother, was that error harmless?

(4) Did petitioner waive her ability to raise the "inference of guilt from assertion of rights" issue in this court by not raising it in the trial court?

For reasons stated, the Magistrate concluded that the court should make a *de novo* review of the evidence to determine whether or not petitioner was in custody at the time she first asked for the presence of her mother. The Magistrate then reviewed the situation and concluded that petitioner had been subject to a custodial interrogation. The court agrees with the Magistrate's ultimate conclusion. However, the court has reached that conclusion by a different route from that taken by the Magistrate.

The state trial judge concluded that petitioner was not in custody at the time of her interrogation. The Alaska Court of Appeals, by its *per curiam* opinion, assumed without deciding that petitioner's position – that she had been subject to custodial interrogation – was correct. Judge Singleton, concurring, concluded that the trial judge's ruling that petitioner was never in custody was not clearly erroneous. Judge Bryner in his dissent concluded that petitioner was in custody when she first requested her mother.

The issue of whether or not petitioner was subjected to custodial interrogation "is essentially factual and is reviewable under the 'clearly erroneous' standard."

United States v. Poole, 806 F.2d 853 (9th Cir. 1986); *see earlier decision* 794 F.2d 462, 465 (9th Cir. 1986).

As a result of its review of this matter, the court is convinced that there was clear error on the part of the state trial court in concluding that petitioner was not subjected to custodial interrogation. Stated in terms of the operative statute, the court is convinced that the Alaska trial court's factual determination as regards petitioner's custodial situation is not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

The Alaska State Troopers conducted several fact-finding conversations with the petitioner prior to the interrogation of June 25, 1982. These included the questioning of petitioner upon the arrival by troopers at the crime scene on June 24, 1982, and later that same afternoon at the home of a friend of petitioner. The latter interview took place after petitioner was considered a suspect.

Prior to the questioned interrogation of June 25, 1982, Alaska State Troopers had obtained a search warrant for petitioner's house which they determined in advance to execute in petitioner's presence for the purpose of "apply[ing] pressure to her." R. at 83-84. The troopers went to a residence where petitioner was staying with friends and transported her to her house, the scene of the crime. While one's home is normally a "safe" and positive locus from the perspective of the interviewee, in this instance the troopers' actions served to remove petitioner from the presence of friends who were providing moral or emotional support for petitioner at the time and put her at the scene of the crime.

Upon arrival at petitioner's house, three troopers stayed outside while two began to interview petitioner inside the house. In the first stage of the questioned interrogation, the Alaska State Troopers in substance told petitioner that they did not believe her story about the death of her husband. Petitioner offered to help and again told her story to the troopers. Again a trooper stated that he did not think that was what happened. The other trooper present continued to question her until a few minutes later when he informed her of her *Miranda* rights. Upon petitioner's waiver of her rights, he continued to question her.

In *Poole*, at 467, the Ninth Circuit Court of Appeals has suggested that the "ultimate test" of the nature of questioned interviews in "whether the agent 'should have known that a question was reasonably likely to elicit an incriminating response.'" *Id.*, quoting United States v. Booth, 669 F.2d 1231, 1237-38 (9th Cir. 1981). The facts surrounding the interrogation of petitioner leave absolutely no doubt in the court's mind that the Alaska State Troopers had identified petitioner as their prime suspect *before* the subject interview. The interview in question was not one aimed at general background fact-finding. It was patently and from the start an investigatory procedure. Were there any doubt about it, the trooper's suggestion that petitioner was lying (albeit phrased much more subtly) makes it crystal clear that neutral information was not the quest.

The trooper's challenge of petitioner's veracity must surely have been perceived by the petitioner as "interrogation" as distinguished from neutral fact-finding. More importantly, in terms of the foregoing test, the

trooper plainly sought to have petitioner change her story. As a practical matter, there is a high likelihood that any response from a witness under the circumstances in which petitioner found herself would be incriminating. At a minimum, any change in the petitioner's version of the crime at this juncture would be used by law enforcement personnel to pressure the witness for further changes in her story and likely would be used at a later date to suggest conflicts in her story for purposes of questioning credibility.

Under all of the attendant circumstances, the court feels constrained to hold, as did the Magistrate, that the Alaska trial court was in error when it held that petitioner was not the subject of a custodial interrogation. The evidence is clear and convincing that petitioner was subjected to a custodial investigation.

The court turns to the second question of whether or not the interrogation of petitioner should have stopped when she first requested the presence of her mother. It must first be said that the court's foregoing discussion of the circumstances of petitioner's interrogation on June 25, 1982, raises a question which the parties have not discussed. The court entertains concern that the Alaska State Troopers may have erred in not advising petitioner of her *Miranda* rights at the very outset of the interview in question.

It is the court's view that questions as to the waiver of the right to remain silent or to end an interrogation, like questions of the nature of the interview itself, are matters best allocated to the state trial court. C. Wright & A. Miller, *Federal Practice and Procedure, Habeas Corpus*

§ 4265 at 321-22 (2d ed. Supp. 1987). The original trial court is "better positioned than [this court] to decide the issue in question", *id.* at 322, but in so doing, the state court must employ a correct legal frame of reference. In this case the court concludes, as did the United States Magistrate, that the Alaska courts employed an incorrect legal standard in evaluating petitioner's first request for the presence of her mother before she talked further with Alaska State Troopers. Final Report & Recommendation at 17-22.

It appears that both the Alaska trial court and the Alaska Court of Appeals characterized petitioner's first request to end her interrogation as something other than an unequivocal assertion of her right to remain silent. Having found that petitioner's statement "did not amount to an unequivocal assertion of the right to silence", the appellate court concluded that the Alaska trial court did not err in holding that the troopers were free to continue their interrogation. *Kwallek v. State*, File No. A-31, Memorandum Opinion & Judgment No. 883 at 24 (Alaska Ct. App. July 24, 1985). This was error because the evaluation should not have stopped at this point. Faced with petitioner's equivocal statement about further questioning, the troopers were under a duty to obtain clarification of petitioner's request. See the discussion and authorities in Final Report & Recommendation, pages 22 through 25. It may well be that petitioner's first request pertains solely to the subject of the search warrant which was then being executed by other troopers. *Kwallek* at 24. However, we will never know what the thrust of petitioner's request was intended to be because the troopers did not take the precaution of posing a

clarifying question, *e.g.*: "Can we talk further about matters other than the search warrant?" The court concludes that the trooper's failure to clarify the nature and extent of petitioner's first request that she not be required to talk further, like their similar ignoring of petitioner's second such request and the strategic execution of the search warrant, were all part of a calculated plan to pressure petitioner into changing her story. The court finds no impropriety in the troopers' tactics *per se*, but in exerting pressure upon a suspect, police officers must scrupulously adhere to the well known procedures for dealing with witnesses who express – in whatever fashion – uncertainty as to whether the interrogation should continue. This the Alaska Troopers did not do in the case of petitioner. The failure to ask a clarifying question or questions constituted a violation of plaintiff's constitutional rights.

The foregoing conclusion makes it unnecessary for the court to consider the admissibility of subsequent portions of the petitioner's interview. However, the court will note for the sake of completeness its concurrence in the conclusion of the Magistrate that it is not clear beyond a reasonable doubt that admission of portions of petitioner's interview subsequent to her second request that the interview be terminated did not contribute to the verdict obtained. Here also, the court's reasons are somewhat different from those of the Magistrate who focused upon the substance of the statements. The court would probably concur with the trial court and court of appeals in their conclusion that the substance of petitioner's

answers after the second request to terminate the interview were harmless. *Chapman v. California,* 386 U.S. 18 (1967).

To explain, the court must first address the final issue dealt with in the final report and recommendation having to do with the question of whether or not petitioner waived the right to make an argument based upon *Doyle v. Ohio,* 426 U.S. 610 (1976). The Alaska Court of Appeals found that petitioner's second request was in response to the interrogation and was an unequivocal assertion of the right to remain silent. The court then held that although the statements should have been suppressed, the error was not prejudicial. The court concurs in the Magistrate's holding that petitioner sufficiently raised to the trial court, and the appellate court in fact considered, the merits of the question of whether or not the transcript of petitioner's interview should be redacted so as to delete questions and answers concerning her right to remain silent. That issue was properly before the state courts and is properly before this court.

What concerns the court about the admission of petitioner's interview after her second request that she not be required to talk further without the presence of her mother is not the substance of her answers but the fact that the interview transcript as placed before the jury contained not one but all three requests by the petitioner that she not be required to talk further. This is not a case where an otherwise admissible interview is concluded by a single neutral statement by the witness terminating the interview. *United States v. Haro-Portillo,* 531 F.2d 962, 963 (9th Cir. 1976); *see also United States v. Williams,* 556 F.2d 65, 67 (D.C. Cir.), *cert. denied,* 431 U.S. 972 (1977). The

Alaska trial judge considered petitioner's case to be a close one. R. at 1122. It is not at all improbable that in a close case the jury would have carefully scrutinized petitioner's out-of-court statement. Like the Magistrate, although for the foregoing different reason, I cannot say "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. *Chapman*, at 24.

For the foregoing reasons, the court concurs in the recommendation of the United States Magistrate. A writ of *habeas corpus* shall issue in favor of petitioner if she is not retried within 120 days from the entry of judgment on this order. The Clerk of Court shall enter a judgment granting the petition and providing that a writ of *habeas corpus* will issue to respondents 120 days from the date of said judgment if respondents have not commenced a retrial of petitioner by that date.

DATED at Anchorage, Alaska, this 10th day of June, 1988.

/s/ H. Russel Holland
United States District Judge

cc: D. Westerburg (BIRCH)
C. Hora (AAG-318)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PATRICIA KWALLEK, Petitioner, vs. ROGER V. ENDELL, Commissioner of the Department of Corrections, and HAROLD BROWN, Attorney General of the State of Alaska, Respondents.	No. A86-274 CIV *REPORT AND RECOMMENDATION TO GRANT PETITION FOR HABEAS CORPUS* (Filed May 2, 1988)

INTRODUCTION

Patricia Kwallek was convicted after a jury trial in 1982 for the first degree murder of her husband Bernard, and sentenced to 30 years in prison. Her petition under 28 U.S.C. Sec. 2254 complains that the introduction at trial of a statement she made to police officers the day after the killing violated the rules established by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). The statement as admitted included three separate requests by Kwallek to have her mother present before further questioning. Respondent (the State) opposes the petition on the merits and claims as well that insofar as Kwallek objects specifically to admission of the requests for her mother, the argument cannot be made in this forum because it was not preserved properly at trial.

For the reasons set out below I recommend that the writ issue, and that the State of Alaska be required to retry petitioner within 120 days or release her from custody.

THE INVESTIGATION AND INTERVIEW[1]

Bernard Kwallek was fatally shot five times in the chest, neck, and head outside his home as he was leaving for work at about 7:30 a.m. on June 24, 1982. Several neighbors heard voices about the time they also heard the shots. One heard what he thought were two men shouting at each other, and a woman screaming. A second heard what she thought might have been two men. Others heard the voice of only one man.

In response to telephone calls, Alaska State Troopers arrived on the scene within minutes. Trooper Robert Gorder, the first to arrive, saw Mrs. Kwallek standing near her husband's body as paramedics gave aid. He took Mrs. Kwallek aside, and asked her what had happened. She said she had been in the house, heard some sounds like "pops," then heard her husband scream her name twice, and immediately went outside. Her husband was lying on the ground.

Trooper Lown arrived while Gorder was talking with Kwallek. Shortly thereafter Trooper Marrs arrived. Marrs spoke for less than a minute with Kwallek, asking her if

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[1] The evidence discussed in this section was presented to trial Judge Schulz during the evidentiary hearing, and was available to him at the time he made his rulings on petitioner's motions to suppress.

she knew who killed her husband. She said she did not. Detachment Commander Rogers arrived about 10 minutes later. Fearing that it might not be safe for Mrs. Kwallek to be outside if there were a sniper, he brought her into her home. Once inside, Rogers checked to see if anyone else was there and then interviewed Kwallek in her kitchen. She responded that she did not know what happened or who had shot her husband.

Rogers next called Kwallek's friends Jim and Gerry Jenck. Mr. Jenck arrived soon thereafter. Rogers asked if Kwallek would sign a form consenting to a search of her home for anything that might help in the investigation; she agreed. Witnesses described Kwallek as alternately crying, and mumbling, upset and in shock, but not hysterical, during the morning of the 24th. Jenck said she asked him, "Why wasn't it me?" Christy and Robert Jahnke, Kwallek's daughter and son-in-law arrived after Jenck. Jahnkes heard Kwallek mumbling about a strange noise, and tried to help her determine what it was. About an hour after troopers first arrived, Jenck took Kwallek to his home. Morris visited her there within an hour to let her know her husband was dead. At some point during the day of the killing, Jenck took Kwallek to a hospital and doctor's.

In the early afternoon, after the troopers found spent .22 casings on the ground near the door to the Kwallek home, similar shells in one of the bedrooms, and a .22 rifle in the attic, they began to suspect Mrs. Kwallek. Glass was dispatched to the Jenck home for a more thorough interview. In response to his questions, Mrs. Kwallek reiterated her earlier story, but added that she had heard a "creaky" sound when she came into the

house to call the police. She also admitted both that she and her husband had argued about finances and that her husband had been angry at her for not paying the rent for their boat stall on time.

Mrs. Kwallek spent the night at Jenck's home. By the next day, the troopers had secured search warrants to seize Kwallek's robe, a sample of the insulation from her home, and her financial records. In uniform, Rogers went to the Jenck's home to pick Kwallek up for another interview in the early afternoon on the 25th. Though Kwallek could have been interviewed there again, the troopers wanted to interview her at her own home, where they could contemporaneously apply pressure through service of the search warrants.[2] When Kwallek arrived at the house, Glass and Lown were both there, along with Troopers Bullington and Flothe. Because Kwallek had left her key at Jencks' house, Glass agreed to climb through a window to open the door. Once in, he let Kwallek and Lown in as well. Bullington, Rogers and Flothe stayed outside.

Lown and Glass began their interview at 1:48 p.m. After telling Kwallek twice that she was not under arrest

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[2] Lown testified on direct at the suppression hearing as follows:

> D.A.: Was there any reason why you wanted her [at her home] while the search warrants were being executed beyond [having Kwallek open the door which was locked]?
>
> Lown: It was an indication to her that we had a search warrant. It was to apply pressure to her. [R. 83-84]

and was "free to get up and leave anytime," Glass advised her that they had reason to believe what she had told them before was "not exactly the way things happened." Kwallek had not yet been given *Miranda* warnings.

Offering to help, Kwallek told the troopers that she had come back in the house after saying good-bye to her husband, when she heard a "pop" noise outside. Her husband was screaming her name. She went outside and found him. She then came back into the house to call an ambulance. According to her story, though there were strange noises in the house, she did not investigate them, but again went outside.

Trooper Glass told her he did not think that was what really happened, and that Kwallek was not telling the whole truth.

Trooper Lown switched the subject of the questioning to the weapons the Kwalleks kept in their home, and then returned to the previous day's happenings, trying to pin Kwallek down as to how much time transpired after the shots before she went outside, and to flesh out her movements outside. Next he queried Kwallek about her robe.

This entire initial round of questioning took about eight minutes. At 1:56 p.m., Lown abruptly switched gears:

> "Patsy, before we go any further, ah, we're obligated to advise you of your constitutional rights." [R.48]

Lown gave Kwallek a form which listed her rights, read the rights to her, and then, "to be absolutely sure," she

understood each right, had her initial each, reading them again to her while she did.

The following exchange took place:

Kwallek: Can I stop then if I want to?

Lown: Certainly, that's what it says.

Kwallek: Anytime I want to?

Lown: Yes . . . that's what the waiver says.

Kwallek: O.K.

Before going on with the questioning Lown reiterated, "the reason we do this is because . . . we're required to. Its a requirement for us to talk to you, that we advise you of your rights." This recitation of rights and explanation took four minutes.

Lown went on in what will be characterized as stage two to question Kwallek regarding the .22 rifle, when she had last been in the attic, whether she and her husband argued or were having financial problems, and whether she kept some of the financial problems from her husband because it upset him.

After a few more minutes of this interrogation, Lown told Kwallek that he had "a couple of search warrants" to search for her robe, insulation from the attic, and for financial records. He suggested she read the warrants. He then told her:

> "You are, you have now been served with copies of each of these search warrants. We're going to have the troopers outside, who are investigators from Anchorage come in and conduct the search. [D]o you have any questions about that?

> Kwallek: "No. I think I should wait and talk with my mom gets here before I say what to do [sic]. "

After Lown replied, "O.K.," Glass continued with the interrogation while the two other troopers searched the home. During this third stage of the interview Kwallek told the officers that the circumstances of her husband's departure the day before had been normal. Lown became substantially more accusatorial in his questioning, claiming that others had said her husband was angry over their finances. He asked where the money to pay the bills had gone. Kwallek again asked for her mother.

> Lown: What happened to [the money]?
>
> Kwallek: I will talk when my mom gets here, she can help.
>
> Glass: You want to wait until your mom gets here to talk to us?
>
> Kwallek: She should be here in a little while. Chris is getting her now.

Glass confirmed that she wanted to wait: "Do you want to talk to us then, Patsy when she gets here?" Kwallek agreed. Nonetheless Glass proceeded:

> In the [meantime] we'll just sit here and wait, and let the other two investigators go ahead and . . . maybe you can tell us where the . . . bank records . . . are? Do you have a checking account, Pasty?

He went on to elicit from Kwallek, in what will be termed stage four of the interrogation, that they had no checking account, and that she kept no books despite having a background as a bookkeeper. When she asked for her mother a third time, saying, "I just, [when] mom gets

here, we'll talk about it," the troopers stopped the questioning. It was 2:14 p.m. Glass and Lown took Kwallek to the local trooper office. Her mother met her there, and was permitted to talk to her alone. She gave no other statements to the troopers. Shortly thereafter, she was arrested.

PROCEDURAL HISTORY IN THE STATE COURTS

Petitioner's pretrial motions to suppress argued both that the entire interview was "custodial" and should have been suppressed because warnings were not given at its outset, and, in the alternative that the interview beginning with the first time Kwallek asked to speak with her mother should have been suppressed.

The trial judge assumed that when Kwallek first asked for her mother she wanted to talk about whether she would proceed with the interview,[3] but did not feel suppression of what followed was indicated because the substance of the interview was not incriminating, and because she was never in "custody" during the interview.

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[3] Regarding Kwallek's ambiguous first assertion, Judge Schulz said:

> It is not clear to me, as it apparently was not to the State, what she wanted to talk to her mother about. I say that because at the time that comment was made she had just been advised that other officers were present and they were going to execute some search warrants in the residence. And I can't say for sure whether she wanted to talk to her mother about that

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At trial, an objection to the admission of any of the statement was reasserted and overruled without additional comment. [R. 327] A transcript of the entire interview by the troopers covering all four phases of the questioning and each of the petitioner's three requests for her mother was admitted during the prosecution's direct case.

At trial, the State's case also included testimony from an expert who concluded that the pattern of lead residue on the robe Kwallek was wearing on the morning of the 24th was consistent with her having shot the .22 rifle her husband was killed with. In addition, the State placed great emphasis on the fact that the rifle was found in the attic, theorizing that it was unrealistic for anyone other than Mrs. Kwallek to have placed it there after the shooting, yet before others arrived. The State suggested that Mr. and Mrs. Kwallek had a fight over their finances shortly before his death, during which Mr. Kwallek had told her their relationship was over.

Through her own testimony, and that of others, Kwallek theorized that some other person killed her husband, and hidden the rifle in her home while she was caring for her husband. She placed great emphasis on the

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> or about continuing the interview. I'm going to assume for the purposes of this decision that at that point she indicated – she was indicating that she wanted to talk to her mother about whether or not she would proceed with the interview, but I don't think it really makes any difference. [R. 158-59]

fact that she had consistently told the officers of a "strange sound" she heard when she had entered the home to call police, and the reports of those neighbors who heard more than one male voice about the time the shots were fired.

In her timely appeal to Alaska's Court of Appeals Kwallek raised a number of state and federal issues, only two of which are relevant here. First, she argued that the substance of what she said during the interview was inculpatory and in violation of *Miranda*. Second, she argued that the requests for her mother themselves should have been suppressed because the invocation of her *Miranda* rights would have been construed as evidence of guilt.

The Court of Appeals issued an unreported Memorandum Opinion and Judgment affirming the conviction and sentence. There were three separate opinions. An extensive "per curiam" decision was joined in by both concurring Judge Singleton and dissenting Judge Brynner on each of the multitude of issues which is not in issue here, and was for all intents and purposes unanimous in rejecting the errors Kwallek has chosen not to relitigate here. But the court split dramatically on the issues now presented in this forum. The author of the per curiam decision concluded that Judge Schulz' finding that Kwallek was not in custody at the *beginning* of the interview was not clearly erroneous. After detailing the additional factors which suggested that Kwallek was in custody at the time she first asked for the mother, the per curiam opinion avoided a holding on the custody issue,

by "assuming" that Kwallek was in custody at that time.[4] The per curiam decision went on to hold however that because Kwallek's assertion of her right to be silent was not "clear and unequivocal," the police were authorized to continue their interrogation. The per curiam opinion went on to conclude that though Kwallek's *second* request for her mother was an unmistakable assertion of her right to silence, and the interrogation should have ceased at that point, the admission of the information elicited in the fourth phase of the interview was harmless beyond a reasonable doubt.

The court viewed Kwallek's argument that the requests to speak with her mother themselves should not have been admitted as raised for the first time on appeal, and applied Alaska's plain error rule.[5] Finding that they provided the jury with an explanation why the interview terminated, and that they would not have been viewed by the jury as evidence of guilt, the court concluded, "assuming admission of the challenged evidence constituted an error affecting Kwallek's substantial rights, we conclude that the error was not obviously prejudicial."

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[4] The per curiam author wrote: "In considering the suppression issue it is assumed, without being decided, that Kwallek's argument with respect to the custodial nature of her interrogation is correct." *Kwallek v. State*, No. 883, July 24, 1985, n. 14.

[5] Ak. R. Crim. Pro. 47 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.")

Concurring, Judge Singleton concluded that the trial judge's ruling that Kwallek was never in custody and that she never unequivocally invoked her right to remain silent were not clearly erroneous. He was apparently more troubled by Kwallek's argument that consciousness of guilt or an inference of guilt could have been inferred from her requests to have her mother present, but concluded that it was not plain error under the circumstances to have admitted the transcript of the entire interrogation.

Judge Brynner, dissenting, concluded that Kwallek was in custody when she first requested her mother, that she did unequivocally assert her right to remain silent at that time, and that the admission of what followed was not harmless beyond a reasonable doubt.

The Alaska Supreme Court denied Kwallek's petition for hearing without opinion. Two of the five justices would have accepted the case on the *Miranda* issue presented here. The United States Supreme Court summarily denied her subsequent request for a writ of certiorari.

ISSUES PRESENTED

Kwallek claims that the admission of any portion of the transcript beginning with her first request for her mother violates her right to remain silent under *Miranda* and constitutes, insofar as it specifically includes the requests for her mother, an inappropriate admission of her assertion of that right, which improperly permitted the jury to infer guilt.

The state argues: (1) Kwallek was never in custody, and so *Miranda* has no application; (2) Kwallek's first request for her mother was made in response to a question about the search warrants, not as an attempt to terminate the interview; and (3) even if any error occurred through the admission of the interview transcript after Kwallek's first request for her mother, it was harmless. Finally, the state argues that Kwallek did not properly preserve the "inference of guilt from assertion of rights" issue at trial, and is therefore precluded from raising it in this forum.

DISCUSSION

I. *Was Kwallek in custody?*

A. *Standard of Review.*

The State argues first that because the trial court found that Kwallek was not in custody for *any* of the challenged interview, the finding is entitled to 28 U.S.C. Sec. 2254(d)'s "presumption of correctness," and is unreviewable in this forum. Trial Judge Schulz did conclude Kwallek was not in custody, and based his ruling that the entire statement was inadmissible on that ground, *inter alia*. But the per curiam opinion in the Court of Appeals, in considering the suppression issue, *assumed* without deciding that Kwallek's argument with respect to the custody issue was correct. Interestingly, based on this "assumption," Kwallek implores this court to rely on 28

U.S.C. Sec. 2254(d)'s "presumption" as well, arguing that the assumption should be presumed to be correct.[6]

Under the unusual circumstances that are present in the wake of the Court of Appeal's decision, neither position is correct.

In a federal habeas proceeding, a statutory presumption of correctness applies to "subsidiary factual questions resolved in state court proceedings," 28 U.S.C. Sec. 2254(d), if they are fairly supported by the record.[7] However, determinations on mixed questions of law and fact that require the application of legal principles to historical facts, *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333 (1980), are not subject to the presumption. In those situations, a federal habeas tribunal's standard of review is plenary.

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[6] Kwallek also argues that the State did not make any argument to either the Court of Appeals or the Alaska Supreme Court that Kwallek was in custody, and thus has waived the ability to argue she was not in custody to this court. I need not reach the merits of this argument.

[7] Section 2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for a writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless . . .

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The statutory presumption of correctness attaches to subsidiary findings of historical fact that are relevant to the resolution of mixed questions and questions of law, whether the factual determination was made by a state appellate court or by a state trial court. *Sumner v. Mata*, 449 U.S. 539, 549, 66 L.Ed.2d 722, 732 (1981). In determining whether there is such a finding of historical fact to which the presumption should apply, the federal court looks to the last state court decision which purports to resolve the issue.

In this case, the decision of the Court of Appeals was the last state decision to broach the issue of "custody." The vote of one of three judges in the per curiam decision that "custody" was assumed is not sufficient to bind this court to a determination in Mrs. Kwallek's favor. Nor is Judge Singleton's conclusion, in his concurrence, that the finding that Mrs. Kwallek was always in custody was not clearly erroneous, enough to bind this court in favor of the State. Given the ambivalence on the issue by the Court of Appeals, it is inappropriate for this court to look solely to the position of the trial judge as the last statement from the state courts. Under the circumstances, this

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> (8) . . . that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

court should make a de novo review of the evidence to determine whether Mrs. Kwallek was in custody at the time she first asked for her mother. *See United States ex rel. Argo v. Platt*, 673 F.Supp. 282, 290-91 (N.D.Ill. 1987).

B. *Kwallek was the subject of "custodial interrogation."*

Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317 (1984), requires application of an objective test to determine whether a suspect is in custody: "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." 468 U.S. at 442, 82 L.Ed.2d at 336; *United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987), *modified* 830 F.2d 127. Whether a person is in custody or otherwise deprived of her freedom of action in any significant way is answered by reviewing the totality of facts involved at the time of the alleged restraint. In this circuit, under *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1982), the following "pertinent areas of inquiry" have been identified: (1) the language used by the police in summoning the person interviewed; (2) the physical characteristics of the place where the interrogation occurred; (3) the degree of pressure applied to detain the individual; (4) the duration of the detention; and (5) the extent to which the person was confronted with evidence of his guilt. 669 F.2d at 1235.

Consideration of *Booth*'s "pertinent areas" as well as the other relevant factors present on the afternoon of the 25th lead this court to conclude that Kwallek's interrogation at the time of her first request for her mother was custodial. First, Kwallek had been questioned several times previously at the scene, and once extensively by

Trooper Glass the preceding afternoon, which interview was recorded. Second, she had been brought from Jencks' residence where her friends and family were present, and were she had spent the night, to her home in a police car. No persons other than Kwallek and the troopers were present in her home during the interview. Third, the two investigators who were questioning her each became increasingly accusatorial in response to her answers. This would have led her to conclude that she was a suspect rather than a witness. Fourth, though at the beginning of the interview, she was told twice that she was *not* under arrest, and "free to get up and leave any time," she was later told when the *Miranda* warnings were given that the recitation was *required* before any further interrogation could occur. Those "rights" did not include a reiteration of the right to leave anytime. Fifth, she had been advised that two search warrants had been issued, presumably by a judge, for her home, and told she should read them. Sixth, two additional uniformed officers, who she was told were from Anchorage, were present on the scene to execute the warrants.[8]

While Kwallek was not formally placed under arrest during phases three and four of the interrogation, or within the physical confines of a police station, the "totality of circumstances" presented with five state troopers

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[8] Though some courts, *e.g.*, *Hunter v. State*, 590 P.2d 888 (Alaska 1979), have concluded that what actually happens to a suspect should be a factor in determining whether she was in custody at the time of an interview, and would therefore consider the subsequent arrest, such reliance appears inappropriate because that fact would not have been known to the suspect at the time of the interrogation.

present in her home, simultaneously questioning her and searching it, bring the case within the purview of "custodial interrogation." *Accord, United States v. Beraun-Panez*, 812 F.2d 578, 580-82 (9th Cir. 1987); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982); *United States v. Scharf*, 608 F.2d 323, 325 (9th Cir. 1979); *United States v. Bekowies*, 432 F.2d 8 (9th Cir. 1970).

II. *Should the Interrogation have Stopped after Kwallek's First Request for her Mother?*

A. *Standard of Review*

Again, a complicated issue regarding the impact of 28 U.S.C. Sec. 2254(d) is presented by the proceedings in the state courts. The State argues that because both the trial court and the Court of Appeals[9] concluded that Kwallek's first request for her mother was not an implied assertion of her right to remain silent, this court is bound by that finding of historical fact. Despite the relatively clear determinations by both the trial court and a majority of the Court of Appeals, this court rejects the invitation.

In both the trial court and the Court of Appeals, the focus of the inquiry relating to whether Kwallek impliedly asserted her right to be silent was on whether her first request was "equivocal." The courts relied on two

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[9] With respect to this "implied assertion of right to silence" issue, there was a prevailing opinion in both the per curiam decision and in Judge Singleton's concurrence that Kwallek's first request for her mother was an "equivocal" assertion of her right to be silent, and as such, the police were not obligated to stop the interrogation.

state cases, *Vail v. State*, 599 P.2d 1371, 1378 (Alaska 1979) and *Nashoalook v. State*, 663 P.2d 975, 978 (Alaska App. 1983), for the proposition that an assertion of the right to be silent must be unequivocal.

In so doing, those courts applied what this court believes to be an incorrect legal standard.[10] An interrogating officer must determine whether an accused wants to remain silent after an equivocal assertion of the right to silence is made. See the discussion below in Part IIB. The state court's ruling is, as such, a mixed question of law and fact, *Ahmad v. Redman*, 782 F.2d 409, 413-14 (3d Cir. 1986), *cert. denied*, 479 U.S. ___, 107 S.Ct 119, 93 L.Ed.2d 66 (1986); *Finney v. Rothgerber*, 751 F.2d 858, 862 (6th Cir. 1985), *cert. denied*, 471 U.S. 1020, 85 L.Ed.2d 310; *Fernandez v. Rodriquez*, 761 F.2d 558, 561-62 (10th Cir. 1985); *Paxton v. Jarvis*, 735 F.2d 1306, 1309 (11th Cir. 1984),

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[10] Interestingly, the Alaska Supreme Court was presented with a similar question involving an equivocal assertion of the right to counsel, in *Giacomazzi v. State*, 633 P.2d 218, 222 (Alaska 1981). There the court noted the difficulty a police officer has in determining whether a suspect intends to invoke his right to have an attorney present, and suggested the officer seek clarification of the suspect's desires. *Giacomazzi* was followed by the Court of Appeals in *Hampel v. State*, 706 P.2d 1173 (Alaska App. 1985), where the court held explicitly:

> [W]e hold that when the accused makes an ambiguous or equivocal reference to counsel during a custodial interrogation, the officer need not immediately

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cert. denied 469 U.S. 935, 83 L.Ed.2d 271 (1984); *Lightbourne v. Dugger*, 829 F.2d 1012, 1018 (11th Cir. 1987); *Bailey v.*

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> terminate the interrogation. Further questioning, however, must be limited to clarifying the reference. Thus, any questioning on the subject matter of the investigation must be suspended until the intent of the accused is clarified.

The court went on to explicate the policy reasons for such a rule:

> If no reasonable effort were made to clarify equivocal requests for counsel during custodial interrogations, only those who are most assertive and articulate would be capable of effectively exercising their fifth amendment rights. Little would remain of *Miranda*'s declaration that the right to counsel may be invoked "in any manner." . . . Unless the intent of the accused is appropriately clarified after an equivocal or ambiguous reference to counsel, the voluntariness of any subsequent statements given in response to continued custodial interrogation is necessarily subject to grave doubt.

A footnote in *Hampel* contained dicta suggesting that the court would place a lesser duty on police officer if a suspect asserted a right to silence in an equivocal fashion. 706 P.2d at 1179, n.4, *see Nashoalook v. State*, 663 P.2d 975, 978 (Alaska App. 1983); *but cf. Alili v. State*, 670 P.2d 713, 715 (Alaska App. 1983). The distinction does not appear to be sound since the policy reasons which justify *Hampel*'s result apply equally to a suspect's Fifth amendment right not to incriminate herself as to her right to counsel in the interrogation context. *See* I. W. LaFave & J. Israel, *Criminal Procedure*, Sec. 6.9 (1987 Supp. at 58) ["Some courts have wisely concluded that in the event of an 'equivocal' invocation of the right to silence, the only permissible course of action for the police is 'to attempt to clarify' the defendant's intentions."]

Hamby, 744 F.2d 24, 26 (6th Cir. 1984); *see United States ex rel. Argo v. Platt*, 673 F.Supp 282, 288 (N.D. Ill. 1987).[11]

In *Bailey*, the court was presented with an equivocal assertion of the Sixth Amendment right to counsel during custodial interrogation. The trial court had found the suspect's statement did not constitute a request for counsel.

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[11] *Miller v Fenton*, 474 U.S. 104, 88 L.Ed.2d 405 (1986) holds that in habeas corpus proceeding the federal court need not defer to a state court's finding that a confession was voluntary under the due process clause because "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination" and not a question of historical fact. 474 U.S. at 110, 88 L.Ed.2d at 410. In a note the court left open a subsidiary issue with significant overlap to that presented in this case at its footnote 3: "The present case presents no occasion for us to address the question whether federal habeas courts must accord the statutory presumption of correctness to state court findings concerning the validity of a waiver [of *Miranda* rights]."

Two overlapping panels of the Seventh Circuit have adopted the view that the voluntariness of a waiver is a factual issue, *Perri v. Dept. of Cor. of Ill.*, 817 F.2d 448, 450-51 (7th Cir. 1987) *cert. denied* 484 U.S. ___, 108 S.Ct. 135, 98 L.Ed.2d 92, and *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 219 (7th Cir. 1987), *cert. denied* 484 U.S. ___, 108 S.Ct. 140, 98 L.Ed.2d 142.

The *Bryan* court cited *Nelsen v. McCarthy*, 637 F.2d 1291, 1295-96 (9th Cir. 1980), *cert. denied* 451 U.S. 940, 68 L.Ed.2d 327 (1981) for the proposition that the issue was factual, as well as other cases from this circuit which hold that on direct review of a district court's judgment the issue of voluntariness of a

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> The question of whether someone has made a request for counsel could be considered a strictly factual inquiry and so reviewable under the liberal *Sumner v. Mata* standard. However, in our view, it is more properly considered a mixed question of law and fact, much as the decision to waive a constitutional right and so judged according to a federal standard and not that of *Sumner*.

Despite the great weight which should be given to the considered conclusions of a coequal state judiciary even when this court's review is plenary, *Miller v. Fenton*, 474 U.S. at 112, 88 L.Ed.2d at 412, I nonetheless conclude

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confession is essentially factual, *see United States v. Alderdyce*, 787 F.2d 1365, 1368 (9th Cir. 1986); *United States v. Binder*, 769 F.2d 595, 598 (9th Cir. 1985), in support of its result. 820 F.2d at 219-20.

In the wake of *Miller v. Fenton*, and two later Supreme Court cases, *Colorado v. Connelley*, 479 U.S. ___, 107 S.Ct. 515, 522-24, 93 L.Ed.2d 473 (1986), and *Crane v. Kentucky*, 476 U.S. 683, 90 L.Ed.2d 634 (1986), this circuit seems to be reevaluating its previous holdings as to what sort of a determination "voluntariness" is in the confession context. *See United States v. Wilson*, No. 86-1390 (9th Cir. 1/22/88), p. 1556; *United States v. Crespo de Llano*, 830 F.2d 1532, 1541, n.2 (9th Cir. 1987), *amended* No. 86-1373 (9th Cir. 2/2/88), p. 1337-38; *United States v. Wolf*, 813 F.2d 970, 974-76, & n. 16 (9th Cir. 1987). Whatever resolution of these difficult issues ultimately obtains in other contexts, the determination of whether the issue in the case at bar is a mixed question is more straight forward since by concluding that the state courts used an improper legal standard I am bound to conclude that review of their ruling is a mixed question of law and fact.

that the standard the trial court used was erroneous.[12] Under the circumstances, this court should review the "implied assertion of rights" issue independently. *See United States ex rel. Argo v. Platt*, 673 F.Supp 282, 288 (N.D. Ill. 1987).

B. *Kwallek's First Request for her Mother obligated the Troopers to Stop their Questioning.*

Miranda's language provides the starting place for analysis:

> [I]f the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent the interrogation must cease. . . .384 U.S. at 474, 16 L.Ed.2d at 723.

Miranda requires an interrogating officer to determine whether the accused wants to remain silent when an equivocal assertion of the right to silence is made. *Martin v. Wainwright*, 770 F.2d 918, 923-24 (11th Cir. 1985), *modified on other grounds*, 781 F.2d 185, *cert. denied* 479 U.S. ___, 93 L.Ed.2d 281 (1986); *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979).[13]

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[12] Even assuming that the finding that Kwallek did not sufficiently assert her right to silence were to be found a historical fact to which this court normally owes deference, I find it unsupported in the record for the reasons set out below in Part IIB. 28 U.S.C. Sec. 2544(d)(8).

[13] The same rule applies to an equivocal assertion of the right to counsel in this circuit. *E.g., United States v. Porter* 764 F.2d 1, 6-7 (9th Cir. 1985); *United States v. Fouche*, 776 F.2d 1398, 1404-05 (9th Cir. 1985); *see United States ex rel. Espinoza v.*

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In *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985), the court wrote:

> [W]here a suspect makes an equivocal assertion of counsel, the police must cease all questioning, except that they may attempt to clarify the suspect's desire for counsel. . . .If clarification reveals that the suspect wants counsel, all interrogation must stop until counsel is provided; if clarification reveals that the suspect does not want counsel, the interrogation may continue. 776 F.2d at 1404-05.

The State argues that Kwallek's first request for her mother was clearly a response to the troopers serving the warrants, and not to the course of interrogation. If Lown's question and Kwallek's response were the only evidence on which to make the ruling, this court might concur. But at the start of the interview when Kwallek was asked if she understood her rights, she had asked the troopers it she could terminate the questioning at any time, putting them on notice that she might choose to do so. The troopers could have clarified her intent when she first asked for her mother, as they did later, by asking Kwallek whether she was willing to go on with the questioning. Given the point at which the first request was made, when the additional troopers were entering Kwallek's residence, the troopers should have sought clarification.

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Fairman, 813 F.2d 117, 123-24 (7th Cir. 1987), and cases cited therein; *Lightbourne v. Dugger*, 829 F.2d 1012, 1018 (11th Cir. 1987), and cases cited therein. The issue was left unresolved by *Smith v. Illinois*, 469 U.S. 91, n. 3, 83 L.Ed.2d 488, n.3 (1984).

What was obvious was that the troopers did not want to stop.[14] They had deliberately set up the interview at Kwallek's home away from her friends where there would be more pressure on her. They chose not to serve the warrants at the outset of the interview to heighten the pressure on her when they did serve them. It is reasonable to infer that they wanted to continue the questioning whether or not Kwallek wanted to stop. Indeed, later, the second time Kwallek asked for her mother, when her request to stop talking was explicit, the troopers cavalierly ignored it. Such conscious, planned disregard of *Miranda* should not be countenanced.

Confronted with what should have been construed as an ambiguous statement,[15] the troopers were under a

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[14] "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not waive his privilege." 378 U.S. at 476, 16 L.Ed.2d at 725.

[15] Interestingly, Lown testified on direct at the suppression hearing that, at the time the warrants were served, Kwallek "wanted to wait until her mother was present before she talked any more, or before we talked any more,"[R. 61], and on cross-examination that: [quote p. 65 11 1-13, 122-0.76, 14]

Q: Now, at some point Mrs. Kwallek, during the interview, indicated that she didn't want to talk any more, is that correct?

A: Yes.

Q: At what point did she first make that indication?

A: She stated she did not want to talk until after he had talked to her mother.

Q: All right, and was that around the time when the other troopers were coming in to execute the warrants?

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duty to clarify Kwallek's intentions when she asked for her mother.[16]

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A: I believe it was.

Q: Did you and Sargeant Glass then continue to ask her questions after that point?

A: I believe she was asked a few questions, yes.

. . . .

Q: And did she, subsequent to that first – after she first made an indication she didn't want to talk any more, or she wanted to discontinue the questioning, did she repeat it at a later time?

A: I think she said it several times.

Q: All right. And you and Sergeant Glass, nevertheless, continued to ask her some questions?

A: General Questions. [R. 75-76]

Petitioner assigns great import to what she characterizes as Lown's *knowledge* that Kwallek wanted to assert a right to be silent when she first mentioned her mother. I do not attribute any special significance to what Lown believed, whether Kwallek is correct that he knew from the first that Kwallek wanted to stop the interview, or whether the State is right, that Lown's testimony was ambiguous, and he was referring to her second, more explicit, request to be silent during both his direct and cross. The actual language as it appears in the transcript is not a request to stop talking. It was in fact more equivocal then Lown apparently remembered. But his preception at the time is essentially irrelevant since the test is objective. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed.2d 297 (1980).

[16] In its objections to this court's preliminary report and recommendation, the State argued for the first time that

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I find that under the circumstances presented, Kwallek's first request for her mother sufficiently asserted her right to remain silent to require the officers to stop and inquire further. Because their deliberate plan to pressure a confession out of Kwallek was not consistent with solicitude for Kwallek's Fifth and Sixth Amendment rights, they chose not to. A violation of constitutional magnitude occurred.

III. *Was the Admission of Parts Three and Four of the Interview Nonetheless Harmless Beyond a Reasonable Doubt?*

The State argues that even if the admission of the contested segments of Kwallek's interview was error, it was harmless beyond a reasonable doubt under *Chapman*

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Kwallek's first request was a limited request for her mother to be present but not equivocal. *See Connecticut v. Barrett*, 479 U.S. ___, 93 L.Ed.2d 920, 926-28 (1987); *United States v. Thierman*, 678 F.2d 1331, 1335-36 (9th Cir. 1982). But *Barrett* involved a situation where the defendant expressly asserted his willingness to talk to police: he was just unwilling to give a written statement without his attorney present. 93 L.Ed.2d at 926. No interpretation or clarification of his statement was required to be made by the police because no ambiguity was present. In the case at bar, under the circumstances, Mrs. Kwallek's first invocation was ambiguous, and as such within the rule of *Martin*, 770 F.2d at 923-24, and *Thompson*, 601 F.2d at 771.

v. California, 386 U.S. 18, 17 L.Ed.2d 705 (1967).[17] When trial error infringes on constitutional rights, *Chapman* requires reversal unless I find that the error was harmless beyond a reasonable doubt. Such doubt can be raised by a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171 (1963).[18]

Consistent with this court's duty under *Harrington v. California*, 395 U.S. 250, 23 L.Ed.2d 284 (1967), *Milton v. Wainwright*, 407 U.S. 371, 33 L.Ed.2d 1 (1972), and *Schneble v. Florida*, 405 U.S. 427, 31 L.Ed.2d 340 (1972), the entire record has been reviewed. It is a close issue, but I cannot say that the State's case was so strong, or that Kwallek's assertions were so buried in the record that it was harmless beyond a reasonable doubt to admit the interview after Kwallek's first request for her mother.

There is no question that the State's case, though circumstantial, pointed overwhelmingly to Kwallek as

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[17] The State had conceded that the issue as to whether constituional error is harmless beyond a reasonable doubt presents a mixed question of fact and law. *Adamson v. Ricketts*, 758 F.2d 441, 447 (9th Cir. 1985); *accord, United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987).

[18] Recent case law suggests that improper admission of or comments on assertions of the right to remain silent are scrutinized with the same rigorous care as are other issues under *Chapman*. *See United States ex rel. Miller v. Greer*, 789 F.2d 438, 440-41 (7th Cir. 1986), and cases cited therein [single question by prosecutor on cross examination as to why defendant had not given story at time of arrest reversible, despite curative instruction and strong government case].

having opportunity.[19] But on the crucial issue of motive, the state was unable to establish so convincingly why the parties' financial difficulties would have led Mrs. Kwallek to kill her husband.

If motive was an issue for the jury, they could well have relied on phases three and four of the interview, both because they contained information regarding the disagreement over their financial affairs, and because Kwallek's requests to have her mother present in response to increasingly aggressive questioning could have been perceived as consciousness of guilt. Kwallek asked for her mother only after Lown and Glass pressed for details, and indicated that they did not believe her. This appears particularly significant because Kwallek had during prior interviews appeared to be cooperating with the troopers. Moreover, there were three separate assertions in the exhibit that was presented to the jury and an additional reference to her request for her mother presented to the jury through Lown's direct testimony.[20]

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[19] The rifle which killed Mr. Kwallek was found in the attic; spent shells were found near the front porch. A state expert testified that the pattern of residue of Kwallek's robe was consistent with her having shot the murder weapon. On the issue of motive, there was plenty of testimony in the record apart from Kwallek's admissions to Lown and Glass of financial difficulties, and that those difficulties were a problem in her relationship with her husband, and that she was trying to hide some of the problems from her husband.

[20] In addition to the exhibit which was presented to the jury, Lown testified at trial that roughly contemporaneous with the arrival of the troopers to effect the search, Kwallek indicated she did not want to talk, and wanted to wait until her mother arrived. [TR. 325-326.]

The State's position that the jury could not have focussed on the improperly admitted portion of the interrogation transcript cannot be sustained. In her opening remarks, the District Attorney implicitly directed attention to the defendant's statements by pointing out that there were no eyewitnesses, that the exhibits were evidence, that the defendant did not confess, and that the District Attorney assumed the defendant would stand by her story. [R. 235-41]. During her case in chief, the District Attorney had Lown testify that he advised Kwallek of her rights, that she was interviewed, and much of the substance of the interview up through the time Kwallek first asked for her mother was elicited. [R. 316-325]

Though the substance of Kwallek's remarks after her first request for her mother were not discussed in oral testimony extensively, Lown did mention there came a time when Kwallek did not want to talk any more. [R. 326] Later there was extensive testimony during the direct of Glass regarding a comparison of the June 25 interrogation and that which occurred on June 24 in the afternoon. [R. 564-577] The amount of time which the prosecutor spent both discussing the second interview and then comparing the first with the second could well have highlighted their importance to the jury, and made the entire second interview the object of juror scrutiny.

So too, Kwallek did present a defense with believable elements. Even before she was a suspect she was complaining about the noise she heard when she came in from the front yard to call police, and which she subsequently suggested was the perpetrator hiding the rifle in the attic. There was evidence from two neighbors that there were two male voices at the time Mr. Kwallek was

shot, and no other male was shown to be at the scene. [R. 699-701, 918-19] In addition, Kwallek also asserted that the State had failed to preserve evidence which might have helped her case: a bloody handprint from the truck near where Kwallek was found, fingerprints from the weapon, and a swabbing from her hands. Moreover, Kwallek presented testimony that even if there were financial problems in their relationship, they did not seem to have affected Mr. Kwallek substantially.

Trial Judge Schulz, obviously in a better position than this court to determine the credibility of the contested testimony because he heard and saw the witnesses, was presented with a similar issue in determining whether to grant bail to the petitioner in a post-trial hearing. He indicated that in his opinion the case was close, [R. 1128], and that he had "some problem that the evidence as to exactly what happened on June 24th is pretty skimpy." [R. 1129]

While Judge Schulz did not feel that the State's case was so deficient that a new trial was indicated, his comments are support for this court's view that the case was sufficiently close that the erroneously admitted portion of the statement could have made a difference under the *Chapman* standard. I cannot say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 17 L.Ed.2d at 710; *accord, United States v. Porter*, 764 F.2d 1,7 (9th Cir. 1985); *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978); *Cockrell v. Oberhauser*, 413 F.2d 256, 257 (9th Cir. 1969) *cert. denied* 397 U.S. 994, 25 L.Ed.2d 401 (1970).

D. *Did Kwallek Waive her Ability to Raise the "Admission of Silence" Issue in this Court by not Raising it in the Trial Court?*

In its briefs in both this court and the state appellate courts, the State has taken the position that Kwallek has made two separate arguments, on bases on *Miranda* – that the substance of the interview should have been suppressed – and one based on *Doyle v. Ohio*, 426 U.S. 620, 49 L.Ed.2d 91 (1976) – that the assertions of the right to silence should have been suppressed. The State contends that she may not make the latter argument in this forum because no argument was made to the trial judge that the admission of the requests for her mother would itself be a separate violation.[21]

The argument is without merit. Kwallek's assertion in her motion to suppress, at the evidentiary hearing, and at trial that the entire statement she gave to police violated *Miranda* was sufficient to preserve the issue of whether the prejudice of admitting her requests to wait for her mother as well as the substance of her responses should have been considered. While the catch word *"Doyle"* may have assisted Judge Schulz to look at whether redaction of one or more of Kwallek's requests for her mother was indicated, the reasons he gave for his ruling obviated any need to address those particular statements. Moreover, citation of *Miranda* should place a

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[21] To some extent, petitioner herself has adopted the language implicit in the state's distinction. See Petitioner's Reply at pp. 18-21.

trial judge on notice that admission of responses to questions as well as assertions of the right to be silent cannot be used against a defendant. *Miranda*'s language was explicit:

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the fact of accusation. 384 U.S. at 468, n. 37, 16 L.Ed.2d at 720, n.37.

Long before *Doyle* was written, courts in this circuit interpreted *Miranda* consistently with *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106 (1965) to preclude admission of a defendant's invocation of his right to silence in the prosecution's direct case. *E.g., Cockrell v. Oberhauser*, 413 F.2d at 257; *United States v. Brinson*, 411 F.2d 1057, 1059 (9th Cir. 1969); *Fowle v. United States*, 410 F.2d 48, 55 (9th Cir. 1969).[22] *Doyle*, issued in 1976, precluded prosecutorial *impeachment* of a defendant's testimony through use of his post arrest silence, and thus closed a door apparently left open after *United States v. Harris*, 401 U.S. 222, 28 L.Ed.2d 1 (1971). Citation of *Doyle* was therefore not essential to raise to the trial judge the need to delete from the interrogation transcript not only the substance of the interview after Kwallek's first request for her mother, but also all three requests. Petitioner has accordingly made an

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[22] *See Deering v. Brown*, No. 86-3548 (9th Cir, 2/4/88) (Ferguson, J., dissenting) at 1380-81.

adequate showing that she preserved her objections to the admission of the assertions themselves.[23]

CONCLUSION

In summary, I find under applicable standards of review that Kwallek was the subject of "custodial interrogation" at the time she first asked for her mother, that the request should have led the officers to inquire further regarding her right to remain silence in an effort to clarify, and that admission of the statements after that time was error. I am not sufficiently convinced that the error was harmless under the *Chapman* standard. In conclusion, I recommend that a writ of habeas corpus should issue if Kwallek is not retried within 120 days of the final issuance of this Report.

IT IS SO RECOMMENDED this 28th day of April, 1988, at Kodiak, Alaska.

/s/ Mathew D. Jamin
Mathew D. Jamin
UNITED STATES MAGISTRATE

cc: Judge Holland
Daniel W. Westerburg (BIRCH)
Cynthia M. Hora, AAG 318
Magistrate Roberts

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[23] Kwallek also argues that the State Court of Appeals reached the merits of her second argument so this court should too. I need not consider this argument because of the finding that the matter was raised at trial sufficiently to apprise the trial judge.

Pursuant to Local Magistrate Rule 12(C), the State filed its objections to this report, and Petitioner filed her response to this court's preliminary Report issued on March 8, 1988. Those positions have been considered in this Final Report and Recommendation. The matter is now ripe for review, if requested, by the assigned District Judge, to whom the file has been referred.

APPENDIX D

THE COURT OF APPEALS OF THE STATE OF ALASKA

File No. A–31

PATRICIA KWALLEK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

MEMORANDUM OPINION AND JUDGMENT*

[No. 883-July 24, 1985]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Thomas E. Schulz, Judge.

Appearances: Daniel Westerburg, Birch, Horton, Bittner, Pestinger and Anderson, Anchorage, for Appellant. Cynthia M. Hora, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

PER CURIAM.
SINGLETON: Judge, concurring.
BRYNER, Chief Judge, dissenting.

Patricia Kwallek was convicted, following a jury trial, of the first–degree murder of her husband, Bernard Kwallek, Superior Court Judge Thomas E. Schulz sentenced Kwallek to thirty years' imprisonment. On appeal

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

Kwallek challenges her conviction on numerous grounds. She also contends that the sentence imposed by Judge Schulz is excessive. We affirm.

DESTRUCTION OF EVIDENCE

Kwallek first alleges that the failure of police investigators to gather and preserve certain items of potentially exculpatory evidence deprived her of her constitutional right to due process.[1]

A. *Gunshot Residue Test*

Initially, Kwallek urges that she was deprived of potentially exculpatory evidence because Alaska State Troopers failed to take gunshot residue swabs from her hands for testing purposes until more than twelve hours after the shooting. Kwallek alleges that gunshot residue

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[1] United States Const. amend. V; Alaska Const. art. 1, § 7. Based on the same police conduct, Kwallek also argues that she was deprived of her rights to compulsory process, confrontation, and effective assistance of counsel (United States Const. amend. VI, Alaska Const. art. 1, § 11), as well as her right to fair treatment during an executive branch investigation (Alaska Const. art. I, § 7). Finally, Kwallek argues that the state's failure to gather and preserve evidence violated her right to pretrial discovery under Alaska Criminal Rule 16. Kwallek has not sought to show how the protections afforded to her under these provisions would exceed in scope the protection accorded her by the due process clause of the United States or Alaska Constitutions. Accordingly, our holding on Kwallek's due process claim is also dispositive of the similar claims she predicates on alternative legal bases.

sampling should have been completed within six hours of the shooting.[2]

After a hearing, Judge Schulz fund that Kwallek was not initially a suspect in the murder, and, indeed, that investigators did not have evidence to implicate her until about five and one-half hours after the shooting. The judge also found that the results of a timely gunshot residue analysis would in any event have been inconclusive. Relying on these findings, Judge Schulz decided that no due process violation had occurred. Although he agreed with Kwallek that the troopers should have acted more promptly to obtain swabs once she became a suspect, Judge Schulz declined to consider dismissal as an appropriate sanction. Rather, the judge expressly instructed the jury to view with caution all other gunshot residue evidence presented at trial.[3]

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[2] After the state obtained swabs from Kwallek's hands, it sent them for gunshot residue testing to the F.B.I. laboratory. However, they were not tested. The F.B.I. laboratory informed the prosecution that it would not analyze for gunshot residue because the "excessive period of time" between the time of the shooting and the time of the swabbing "precludes the possibility of a meaningful examination." There is nothing in the record to indicate that Kwallek sought to have independent tests performed on the swabs by a private laboratory or that all laboratories would have been likely to concur with the F.B.I. and refuse to perform analysis.

[3] The robe worn by Kwallek when her husband was shot was seized by the troopers on the day after the shooting and was tested for gunshot residue. This testing yielded results consistent with the theory that Kwallek had fired the murder weapon. The results were submitted to the jury and their

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It is well settled that due process of law is violated when the state fails to preserve material evidence of an exculpatory nature. Evidence is deemed material when it "might have led the jury to entertain a reasonable doubt about the defendant's guilt." *Williams v. State*, 629 P.2d 54, 64 (Alaska 1981). *See also California v. Trombetta*, ___ U.S. ___, 104 S. Ct.2528, 81 L.Ed.2d 413 (1984); *Maloney v. State*, 667 P.2d 1258 (Alaska App. 1983). The duty to preserve evidence at the scene of a crime arises only when the potentially exculpatory nature of the evidence is reasonably apparent. *See Nicholson v. State*, 570 P.2d 1058, 1064 (Alaska 1977); *Hatfield v. State*, 663 P.2d 987, 990-91 (Alaska App. 1983). *See also California v. Trombetta*, ___ U.S. ___, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984).

Kwallek, focusing on Judge Schulz's finding that a negative gunshot residue test would not have conclusively established innocence, argues that the judge applied an incorrect standard, since the question should properly be whether the evidence might have created a reasonable doubt, not whether it would have conclusively ruled out guilt. We need not decide Kwallek's argument, for we conclude that the potential materiality of taking

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significance was the subject of testimony by several witnesses, both prosecution and defense. The instruction given by the court with respect to gunshot residue testing stated:

> In this case there was no timely gunshot residue test on the hands of the defendant. Because the failure to perform that test may have deprived the defendant of evidence in her favor, you are hereby instructed to view all gunshot residue evidence in this case with caution.

gunshot residue swabs form Kwallek's hands did not become reasonably apparent to the troopers until they developed evidence linking Kwallek to the commission of the offense.

As Judge Schulz correctly determined, police suspicion focused on Kwallek for the first time approximately five and one-half hours after her husband had been shot. This left only one-half hour within which the troopers could conceivably have acted without exceeding the six-hour period now proposed by Kwallek as the limit for reasonable police conduct in taking a gunshot residue swab. When investigating officers developed the evidence that initially directed suspicion toward Kwallek, Kwallek was not in police custody, nor was she even in their presence. The due process clause requires reasonableness and fairness, not perfection. *See, e.g., Anchorage v. Flack*, 685 P.2d 108, 109 (Alaska App. 1984). Considering the nature, scope and progress of the investigation, we cannot say that the troopers, once they became aware of evidence linking Kwallek to the crime, were subjected to a constitutional duty to react instantly by assuring preservation of a gunshot residue swab within the next half hour.[4]

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[4] There is no suggestion here of purposeful delay and nothing to indicate that the investigating officers were actually aware, or that they should have been on notice, that the F.B.I. laboratory would decline to analyze gunshot residue swabs taken twelve hours after a shooting. Evidence in the record concerning the issue suggests that, while the reliability of testing declines steadily with time, useful results may in some

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B. *Bloody Palm Print*

Police photographed but did not attempt to lift or otherwise preserve a bloody palm print at the scene of the shooting. The palm print was on the fender of the Kwalleks' pickup truck near the spot where Bernard Kwallek's body was found. Bernard Kwallek had been shot five times in the head, neck, and chest. Investigating officers apparently assumed the palm print had been made by the victim.

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cases be obtained even though the elapsed time considerably exceeds six hours.

We reject Kwallek's related contention that the troopers had a due process duty to take a gunshot residue swab from Kwallek's hand before she became a suspect. Police do have an obligation to preserve and disclose potentially exculpatory evidence, and there are many instances when preservation of evidence may be required even in the absence of a specific suspect. In such cases, the potentially exculpatory nature of the evidence and its relevance to the offense will, as a rule, be reasonably apparent regardless of who the ultimate suspect might turn out to be. *See, e.g.*, People v. Nation, 604 P.2d 1051 (Cal. 1980). However, when, as here, the relevance of evidence is inextricably tied to a particular person's status as a suspect in the crime, no duty to preserve can realistically be said to arise until that person has been or reasonably should have been identified as a suspect. Absent a reasonable indication that Kwallek was implicated in the murder of her husband, police owed her no due process duty to conduct tests simply on the off-chance that she might later become implicated.

At the close of the prosecution's case-in-chief, Kwallek moved for dismissal, raising for the first time the state's failure to preserve the palm print. Judge Schulz found that the evidence would not have been very probative and denied the motion.

Because the state's failure to preserve the palm print was first raised after the commencement of trial, our determination of this issue is governed by stricter standard of materiality than would apply had a timely pretrial motion to dismiss been made. Where the issue of the state's failure to preserve exculpatory evidence is raised for the first time at trial the accused normally must bear the burden of establishing not that the evidence might have led to a reasonable doubt, but that the evidence would in fact have been exculpatory and that it would actually have created a reasonable doubt. *See Maloney v. State*, 677 P.2d 1258, 1266 and n.9 (Alaska App. 1983). *See also United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).[5]

Applying this standard[6], we conclude that Kwallek has failed to meet her burden of establishing the

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[5] Kwallek urges that this court not to apply the *Maloney/Agurs* standard of materiality to this case because *Maloney* was not yet decided when this case was tried. However, our holding in *Maloney* did not create a new rule of law or depart from established precedent Rather, it applied a rule that had been settled by the United States Supreme Court's 1976 decision in *Agurs*. *See Maloney*, 667 P.2d at 1264.

[6] In *Maloney*, 667 P.2d at 1265 n.7, we indicated that the question whether to apply the more stringent *Agurs* standard of materiality must be answered on a case by case basis. The

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materiality of the palm print. From the testimony of the investigation troopers, there is considerable doubt that the print would have yielded an impression capable of being used for purposes of comparison. Moreover, at the time the crime scene was being investigated, it appeared highly likely that the print was left on the pickup truck by the victim. According to Kwallek's own testimony at trial, she went to the front door of her house almost immediately after she heard shots. She saw no one in the immediate vicinity. Even assuming the presence of a usable print that had not been made by Bernard Kwallek, it appears that by the time police located the palm print a number of other persons – including Kwallek and a team of paramedics – had had access to the area and an opportunity for contact with the victim's body. It is possible that any one of them could have been responsible for the print.

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record in the present case indicates that Sgt. Lown of the Alaska State Troopers testified before the grand jury about the presence of the palm print. Kwallek's counsel was given a copy of the grand jury transcript and reviewed it before the omnibus hearing. Prior to trial Kwallek was also furnished a copy of a photograph depicting the palm print. Kwallek has never denied being aware of the palm print prior to trial. On appeal, Kwallek's counsel argued that the issue of the palm print was not raised before trial because trial counsel wanted the court to have a chance to hear the state's evidence before ruling on the materiality of the destroyed evidence. This argument finds no support in the contemporaneous record of trial. No explanation was given at trial for the delay in bringing up the palm print issue. Considering the totality of the circumstances and the lack of any on-the-record showing of good cause for the delay in raising the issue, we conclude that the more stringent *Maloney/Agurs* standard of materiality must be applied here.

Kwallek nevertheless contends that the palm print might have been that of the assailant and that the blood might have been the assailant's blood rather than her husband's. In this event, Kwallek urges, her innocence would have been firmly established had a sample of the blood been saved for testing and an impression of the palm print lifted for comparison. Yet we find nothing in the record suggesting even a remote possibility that the victim's assailant was injured in the course of the shooting or that it was the assailant's blood on the fender of the pickup truck. This theory of materiality is, we believe, entirely speculative. *See Maloney v. State*, 667 P.2d at 1266.

C. *Fingerprints On Murder Weapon*

Kwallek further claims a violation of her due process rights occurred when police failed to preserve potentially exculpatory fingerprints on the murder weapon, a .22 caliber rifle found by Alaska State Troops in Kwallek's attic.[7] Judge Schulz rejected this argument, concluding that there was little possibility that fingerprint evidence would have shed any significant light on the question of Kwallek's guilt or innocence.

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[7] It was not until after the beginning of trial that Kwallek first moved for dismissal based on the state's handling of this fingerprint evidence. The state argues on appeal that Kwallek's motion was untimely and that our holding in *Maloney* should apply to the fingerprint evidence as well as to the palm print evidence. However, it appears that logistical problems stemming chiefly from the state's delay in conducting ballistics tests on the murder weapon prevented Kwallek and her trial counsel from being apprised of details concerning the handling

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After reviewing the record, we are inclined to agree with Judge Schulz's evaluation of the probable significance of the fingerprint evidence, even assuming preservation of usable prints could have been assured by more careful police conduct.[8] It is undisputed that the murder weapon was owned by the Kwalleks and had frequently been fired by Kwallek personally. Thus it would not have been surprising or particularly incriminating to find her fingerprints on the weapon. By the same token, because the gun had been in the Kwalleks' possession for a considerable time and had apparently been used frequently

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of the fingerprint evidence until trial had commenced. We are satisfied from our issue is adequately explained. Accordingly, we find no basis for applying the more restrictive *Maloney/Agurs* standard of materiality.

[8] The forestock and butt stock of the murder weapon were dusted for latent prints by Sgt. Lown shortly after troopers seized the gun. Dusting revealed some ridge patterns on the stocks, and Sgt. Lown lifted two prints from the butt stock. Because the lifts were of poor quality, he elected to terminate his efforts and wrapped the forestock and butt stock with fingerprint tape to preserve all remaining prints. The rifle was later shipped out of state for ballistics testing. It was retuned to Ketchikan shortly before trial. By this time Kwallek had obtained a court order requiring fingerprints from the weapon to be examined within forty-eight hours of its arrival in Ketchikan. Sgt. Glass lifted all prints from the forestock and butt stock and sent the lifts to Juneau for examination by Leif Arnold Lind, a trooper fingerprint expert. At trial, Lind testified, *inter alia*, that none of the lifts from the weapon were of sufficiently good quality to permit comparison with Kwallek's prints.

at places such as local rifle range, it would hardly have been surprising to find the fingerprints of third persons on it. Kwallek has not argued that the murder weapon was inaccessible to other persons prior to the murder. She has not demonstrated why it would be logical to suppose that any third-party fingerprints on the weapon would more likely have been placed there by her husband's assailant than by some other person who had previously handled the gun. Finally, Kwallek has not suggested the existence of any reliable method to distinguish between older and newer third-party fingerprints, so that it might have been possible to make an accurate determination asto whether any third-party prints on the weapon were those of a prior user or of the purported assailant.[9]

Ultimately, however, we need not rest our decision exclusively on the marginal relevance of the potential fingerprint evidence. Our review of the record further convinces us that Kwallek has failed to demonstrate that

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[9] *Compare* White v. State, 577 P.2d 1056 (Alaska 1978) (failure to preserve a lamp bearing the palm print of the accused did not violate due process even though position of the print might have corroborated defendant's version of the incident, since the print would have been of marginal materiality), and Adkinson v. State, 611 P.2d 528, 534 (Alaska 1980) (negligent destruction of finger print evidence on barrel of murder weapon did not violate due process although prints were purportedly those of victim, because they would not necessarily have been exculpatory), *with* Wyrick v. State, 590 P.2d 46 (Alaska 1979) (where fingerprints lifted from items stolen in burglary were apparently the only usable prints on the items and the lifts were preserved and disclosed to the accused, failure to preserve stolen items for additional testing did not violate due process; a different situation would exist if evidence showed use of improper lifting techniques).

the investigating troopers in this case ever actually destroyed any usable fingerprint evidence – whether exculpatory or inculpatory.

In arguing that evidence was destroyed, Kwallek relies heavily on testimony indicating that the fingerprints on the murder weapon were lifted by troopers who were not fingerprint experts, that it is preferable and in keeping with usual trooper practice to have fingerprints lifted, where feasible, by fingerprint specialists, and that it would have been desirable for all prints to have been lifted from the murder weapon early in the investigation, before the rifle was sent away for ballistics testing. Although the testimony relied on by Kwallek certainly indicates that greater caution might have been appropriate in the handling of the fingerprints on the murder weapon, it does little to establish any actual loss of usable fingerprints. There has been no showing that Troopers Lown or Glass, despite their lack of expertise, were not sufficiently trained or experienced to know how to lift usable fingerprints from wooden surfaces like those of the rifle. Nor has there been any suggestion as to precisely what the troopers did or failed to do that might have resulted in the loss of usable prints. In effect, Kwallek's argument assumes that the absence of any usable fingerprints on the weapon should be attributed to mishandling by the Alaska State Troopers. The assumption is both speculative and, with reference to the particular evidence developed before the superior court in this case, unsupported.

Testimony presented below established that fingerprints of identifiable quality are only rarely found on wooden surfaces like the forestock and butt stock of the murder weapon. In addition, both troopers who had attempted to obtain usable prints from the weapon testified that, when dusted, the fingerprints on the weapon appeared to be of poor quality.[10] Indeed, Sgt. Glass, who lifted all but the initial two fingerprints from the murder weapon, candidly acknowledged that he was not a fingerprint expert, yet he described the result of his lifts as "the best available," because "[i]t wasn't a good print to start with." Similarly, the record is devoid of any evidence to support a finding that the delay in lifting fingerprints

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[10] Addressing his initial efforts to lift fingerprints from the butt stock of the rifle, Sgt. Lown testified at one point that he "attempted a couple of fingerprint latent lifts [from the butt stock], . . . they didn't come out that well, and I didn't want to chance ruining any more of them, so I simply covered the rest of [the rifle] with fingerprint tape to preserve whatever was on there." Kwallek seizes on Lown's reference to "ruining" more prints as an admission that the first two lifts he attempted were improperly done. Given the context of Lown's entire testimony, however, Kwallek's characterization of the testimony seems inaccurate. It appears that Lown's statement was not meant as an admission that he had done anything in particular incorrectly in performing the first two lifts; rather, the statement merely recognized that the process of lifting a print inevitably destroys the latent print, thus precluding subsequent attempts by other persons. The testimony obviously indicates Lown's awareness, after attempting to lift two prints, that it would be preferable to take the precaution of having further lifts attempted by someone with more expertise, who might be able

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from the weapon in fact causally related to the troopers' subsequent inability to obtain usable prints.

We conclude that the evidence does not permit a finding of any significant possibility that usable fingerprint evidence was actually destroyed by the troopers' handling of the murder weapon. Accordingly, we rule that Judge Schulz did not commit error in determining that Kwallek's right to due process of law was not violated by the failure of investigating officers to preserve potentially exculpatory evidence.[11]

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to obtain a better result. This is, however, far from tantamount to an admission that the lifts Lown attempted were carelessly or otherwise improperly performed; nor do we read it as equivalent to an admission that usable prints had in fact been destroyed.

[11] Kwallek has additionally argued that the cumulative effect of the troops' conduct amounted to a violation of due process. She relies in part on two decisions from other jurisdictions: State v. Wright, 557 P.2d 1 (Wash. 1976); and Crockett v. State, 603 P.2d 1078 (Nev. 1979). While the issue presented in this case is in our view a close one, we find the cases relied on by Kwallek to be distinguishable. These cases are similar to the present case in that all involve destruction of or failure to preserve a number of different items associated with the crime scene. Neigher *Crockett* nor *Wright*, however, actually found a violation of due process on cumulative grounds after expressly finding that the failure to preserve individual items did not constitute an independent basis for a due process violation. In the present case, we have determined that the separate challenges raised by Kwallek did not individually involve a violation, of her right to due process. Considering the record as a whole, we decline to find a violation of due process based upon cumulative effect.

DISMISSAL OF INDICTMENT

Prior to trial Kwallek moved to dismiss her indictment, alleging that the grand jury was not properly instructed on the standard of proof required to return an indictment. The superior court had informed the grand jury at the beginning of its term that:

> Your duty . . . is to determine whether the evidence is such as would, if unexplained or uncontradicted, warrant a conviction by the trial jury, and leave the determination of guilt, or innocence, to that body.

This instruction, which tracked the substance of Criminal Rule 6(q), was repeated to the grand jury by the prosecutor who presented Kwallek's indictment.

Kwallek argues on appeal, as she did below, that the grand jury should have been told expressly that the evidence would be insufficient to warrant a conviction by the trial jury unless it supported a finding of guilt beyond a reasonable doubt. We reject Kwallek's argument.

Here, the applicable standard, as specified in Criminal Rule 6(q), was properly given to the grand jury. In the absence of an indication of confusion by the grand jury as to the meaning of that standard or of some case-specific need for clarification, we decline to hold that any additional explanation of Criminal Rule 6(q) is required. *See Coleman v. State*, 553 P.2d 40, 48 (Alaska 1976). *See also Adams v. State*, 598 P.2d 503, 510 n.11 (Alaska 1979); *Oxereok v. State*, 611 P.2d 913, 917 (Alaska 1980).

Kwallek further argues that dismissal of her indictment was warranted because the prosecution failed to present exculpatory evidence to the grand jury. She relies

on a portion of an interview given by a friend, Mary Ann White, to Trooper Bullington. In her statement, White arguably said that she had spoken with Kwallek by telephone shortly before Bernard Kwallek was shot and that, at that time, Kwallek had invited her (White) to visit later that morning.

Kwallek argues that White's statement would have given rise to an inference that Kwallek was acting normally and was not in the midst of a dispute with her husband immediately prior to his death. We note, however, that both the phrasing of White's statement to Bullington and the subsequent changes by White in her own account of the incident make it extremely difficult to determine whether White actually meant to indicate that she had spoken with Kwallek on the morning of the shooting or on the prior evening.

In any event, this evidence is not "substantially favorable," so as to require its presentation to the grand jury. *See Tookak v. State*, 648 P.2d 1018, 1021 (Alaska App. 1982). Rather, it falls squarely within the scope of *Frink v. State*, 597 P.2d 154, 166 (Alaska 1979), where the supreme court stated:

> But the prosecutor's obligation to present exculpatory evidence to the grand jury does not turn the prosecutor into a defense attorney; the prosecutor does not have to develop evidence for the defendant and present every lead possibly favorable to the defendant.

See also Preston v. State, 615 P.2d 594, 602 (Alaska 1980). We find no violation of the prosecutor's duty to present exculpatory evidence to the grand jury.

Kwallek's final claim against the validity of the indictment is that the evidence was insufficient. Kwallek reasons that the evidence presented against her to the grand jury was entirely circumstantial and failed to establish a *prima facie* case. We disagree. Considered in its totality the evidence, though circumstantial, would, if unexplained and uncontradicted, warrant a conviction at trial. Alaska R. Crim. P. 6(q). We therefore hold that the superior court did not err in denying Kwallek's motions to dismiss the indictment.

SEARCH AND SEIZURE

Prior to trial Kwallek filed motions to suppress various items of evidence on grounds of illegal search and seizure. The motions were denied by Judge Schulz following a hearing. Kwallek renews her claims on appeal.

First, Kwallek questions the voluntariness of the consent she gave for the search of her residence following the murder. However, there was conflicting evidence presented below on Kwallek's mental and emotional state at the time of her consent. We hold that Judge Schulz's finding that Kwallek's consent was voluntary is supported by substantial evidence and is not clearly erroneous. *Hubert v. State*, 638 P.2d 677, 682 n.4 (Alaska App. 1981). *See also Phillips v. State*, 625 P.2d 816 (Alaska 1980).

Second, Kwallek alleges that the contents of her purse were improperly admitted at trial because the purse was illegally seized from a friend with whom Kwallek had left it. Kwallek's argument presents a close question. *Compare Gieffels v. State*. 590 P.2d 55 (Alaska 1979), and *Ingram v. State*, ___ P.2d ___ , Op. No. 489

(Alaska App., July 19, 1985), *with Gebert v. State*, 454 P.2d 897, 900 (Nevada 1969), and *State v. Schad*, 633 P.2d 366, 372 (Ariz. 1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). It is not necessary for us to resolve this issue, however, since admission of the contents of Kwallek's purse, if error, was clearly harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). Evidence from the purse was cumulative, consisting only of documents relating to the Kwalleks' poor financial condition. A large number of similar papers were seized from Kwallek's residence and admitted into evidence. The Kwalleks' deteriorating financial condition was also documented by numerous other records, as well as by the testimony of various witnesses and by Kwallek's own admissions.

SUPPRESSION OF KWALLEK'S JUNE 25 STATEMENT

Kwallek spent the night after her husband's murder at the house of a friend. The next day she agreed to return home to be interviewed by the Alaska State Troopers. A trooper gave her a ride to her home. At the outset of the interview Sgt. Lown told Kwallek that she was not in custody and asked if she understood that she was free to leave at any time. Kwallek said she understood. Sergeants Lown and Glass interviewed Kwallek for approximately twenty-six minutes; the interview was recorded. Approximately eight minutes into the interview Lown advised Kwallek of her *Miranda*[12] rights. Kwallek asked whether,

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[12] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

if she waived her rights, she would still be free to stop the questioning at any time. After being assured that she was still free to terminate the questioning, Kwallek executed a written waiver of her *Miranda* rights and continued with the interview.

Shortly before completion of Kwallek's interview, two additional troopers, by prearrangement, entered Kwallek's residence and served Kwallek with copies of two search warrants, explaining that one was for financial records and the other for the robe Kwallek had worn at the time of the shooting. Sgt. Lown asked Kwallek if she had any questions about the search. Kwallek replied: "I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sergeants Lown and Glass continued to interview Kwallek, however, pressing for information about why she had not paid recent bills. Kwallek answered a number of questions and then indicated again that she wanted wait until her mother arrived. The troopers acknowledged Kwallek's request but persisted in asking some additional questions about Kwallek's banking records. Though Kwallek responded to several additional questions, she soon stated for a third time that she wanted to wait for her mother. Sgt. Glass formally terminated the interview in response to Kwallek's third request.[13]

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[13] From the point when Kwallek first indicated she wanted to wait until her mother arrived until Sgt. Glass terminated questioning, the interview went as follows:

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During the entire interview, Kwallek made no confession or direct admission of guilt. She did, however,

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Q. [Lown]: You are, you have now been served with copies of each of these search warrants. We're going to have the troopers outside, who are investigators from Anchorage, come in and conduct this search. Do you have any questions about that?

A: No. I think I should wait and talk with my mom [when she] gets here before I say what to do.

Q [Lown]: Okay.

Q [Lown]: Was Spade [Bernard Kwallek] upset yesterday, Patsy, when he left for work?

A: No, he said good morning, joked ah, his back's been feeling good because of the sun. Bothering was his ankle and his toe, he, he's got bad ankles, and they, he turns them and they hurt. And his toe gets sorta swollen and his ankle when he takes his shoes off.

Q [Lown]: Do you remember what happened yesterday morning?

A: Ah, the same thing that happens every single morning, he [pause] . . .

Q [Glass]: Wasn't yesterday morning a little different, Patsy?

A: No. Other than what happened, it wasn't any different between Spader and I.

Q [Glass]: Well Patsy we found the rifle in the attic.

A: Oh, no reason for a rifle to be in the attic.

acknowledge the existence of financial problems and state that those problems had affected her relationship

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Q [Lown]: We found the bullets in the rifle that matched the ammunition in the reloading room. We recovered a bullet from the body of your husband that matches the bullets in the rifle . . .

A: Uhum [yes].

Q [Lown]: . . . we recovered the casings from the spent cartridges right outside your front door.

A: Uhum [yes]. I didn't see anyone outside the front door.

Q [Lown]: Patsy, there was something more going on than what's you're telling us about. Your husband, and we've heard this from several people, was not just a little bit mad, about losing his boat slip, he was extremely mad about it. He was extremely mad because the bill hadn't been paid, because something you were supposed to do, you had not carried through with.

A: That's right but he said that when they took the, the deposit and then covered it, and then the stall should still be ours.

Q [Lown]: Well checking the records with the a, boat harbor people, indicated that the bill was not paid.

A: Well, that's what they say but yet . . .

Q [Lown]: We've also checked other people in town, ah, the building company, ah, the people that hauled in the gravel out here, for your shop that he was building, none of those bills were paid.

A: Not yet they haven't been.

with her husband. At trial, the prosecution used Kwallek's interview to bolster the state's theory that

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Q [Lown]: Why hadn't those bills been paid?

A: [Inaudible] at this point there's no money to pay for them.

Q [Lown]: Now Spade was ah, who everybody we've talked to was a very, very punctual person about paying his bills, I mean he prided himself on paying his bills all the time. He prided on being current and never being behind . . .

A: Uhum [yes].

Q [Lown]: . . . times on bill . . .

A: Uhum [yes].

Q [Lown]: . . . and all of a sudden he wakes up and finds himself, people aren't delivering supplies that he wants unless he pays cash. Now apparently it appears that he thought all these bills were paid. Is there any reason why he would think these were paid and they weren't?

A: Because I hadn't told him anything.

Q [Lown]: Well, uh he's the one who provides the income, is, isn't that correct?

A: Uhum [yes].

Q [Lown]: And a, he knows how much money he makes doesn't he?

A: Uhum [yes].

Q [Lown]: Does he receive a paycheck?

A: Uhum [yes].

Kwallek had killed her husband in a disagreement over the deteriorating state of their financial affairs.

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Q [Lown]: So he would know if there was money to pay the bills, is that correct?

A: [pause] uhum [yes].

Q [Lown]: Is it correct? So he assumed the bills were paid, he would know if there was money present or not, so he would have to assume that there was money enough to pay the bills.

A: Umuh [no].

Q [Lown]: There wasn't money enough to pay the bills?

A: [no verbal response]

Q [Lown]: How come?

A: There just wasn't 'cause it was gone.

Q [Lown]: What happened to it?

A: I will talk when my mom gets here, she can help.

Q [Glass]: You want to wait until your mom gets here to talk to us?

A: [inaudible; both are talking] . . . she should be here in just a little while. Chris is getting her now.

Q [Glass]: Do you want to talk to us then, Patsy when she gets here?

A: Uhum [yes]. Is it be that okay?

Q [Glass]: Sure.

Kwallek moved prior to trial to suppress evidence of her entire June 25 statement, maintaining that she was in

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Q [Lown]: Sure, that's fine.

Q: In the mean time we'll just sit here and wait, and let the other two investigators go ahead and a, maybe you can tell us where the a, bank records a, are? Do you have a checking a account Patsy?

A: Umuh [no].

Q [Glass]: No checking account? How do you keep track of your a, bills?

A: Spader keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

Q [Glass]: You don't have a checking account?

A: No.

Q [Glass]: Has he ever had a checking account?

A: No.

Q [Glass]: A, you're, your background Patsy and your training has been in bookkeeping is that correct?

A: Uhum [yes].

Q [Glass]: Do you keep any kind of books at all? On the money spent out?

A: Umuh [no]. No.

Q [Glass]: How come that is?

custody from the inception of the interview and should therefore have been given a *Miranda* warning before the interview began. In denying Kwallek's motion, Judge Schulz found that she was not in custody when the interview began. Kwallek contests this ruling. We conclude from our review of the record that Judge Schulz's finding is not clearly erroneous. There is ample evidence to support a conclusion that Kwallek could not reasonable have believed that she was in custody when questioning began. Accordingly, no *Miranda* warning was required at that time. *See Hunter v. State*, 590 P.2d 888, 892-99 (Alaska 1979). *See also Quick v. State*, 599 P.2d 712, 717-18 (Alaska 1979); *Hintz v. State*, 627 P.2d 207, 209 (Alaska 1981); *Henry v. State*, 621 P.2d 1, 3 (Alaska 1980).

Kwallek moved alternatively to suppress all responses that she made after she first said she wanted to speak with her mother before answering additional questions. Kwallek argued that continued questioning beyond this point violated her right to remain silent.[14]

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A: I don't know I just, mom gets here we'll talk about it.

Q [Glass]: OK. At the time it is approximately 2:14 p.m. we'll go off record.

[14] Kwallek's argument was premised on the further contention that even if she was not in custody at the inception of the interrogation, the interrogation had become custodial in nature by this point. Kwallek reasserts this argument on appeal. She maintains that by the time she made the initial

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Judge Schulz rejected this argument, finding that Kwallek was not in custody, that her initial request to wait until her mother arrived did not constitute an unequivocal assertion of her right to remain silent and that, in any event, the interview was terminated within a few minutes of Kwallek's subsequent requests to wait for her mother. Judge Schulz concluded that the questioning that followed those requests was perfunctory and produced no incriminating responses. Kwallek challenges the propriety of Judge Schulz's ruling.

It is well settled that once a person has asserted the right to remain silent all further questioning must cease. No particular form of words or conduct is necessary to assert the right. *Giacomazzi v. State*, 633 P.2d 218, 221 (Alaska 1981). However, it has consistently been held that, in order to be effective, assertion of the right to silence must be clear and unequivocal. *Vail v. State*, 599 P.2d 1371, 1378 (Alaska 1979); *Nashoalook v. State*, 663 P.2d 975, 978 (Alaska App. 1983).

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request to wait for her mother, a significant amount of time had elapsed. During this time, the interrogation had intensified and the troopers had disclosed their belief that Kwallek was a suspect and was not telling the truth. She had also been formally advised of her *Miranda* rights. Two additional uniformed troopers had entered Kwallek's home to execute search warrants, and copies of the warrants were served on Kwallek in a manner calculated to enhance the possibility of a confession. In considering the suppression issue it is assumed, without being decided, that Kwallek's argument with respect to the custodial nature of her interrogation is correct.

Having examined the record, we find that Kwallek's initial request to wait until her mother arrived did not amount to an unequivocal assertion of the right to silence. Kwallek made this statement immediately after copies of two search warrants had been served on her. The statement was in direct response not to any portion of the ongoing interrogation, but rather to Sgt. Lown's specific inquiry as to whether Kwallek had any questions about the execution of the warrant. Judge Schulz did not err in finding that Sergeants Lown and Glass were not required to cease interrogation immediately in response to this statement.

In contrast Kwallek's second request was not in reference to the execution of the search warrants, but was clearly in response to interrogation. There was no ambiguity about Kwallek's desire. Her request constituted an unmistakable assertion of her right to silence[15]. As such, it required immediate cessation of all further questioning. All statements Kwallek made after this point should properly have been suppressed.

The state nevertheless maintains that, even if admission of this portion of Kwallek's statement was error, the error was harmless, since Kwallek said very little, either inculpatory or exculpatory, after the second mention of

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[15] Indeed, the record indicates that Sgt. Lown recognized Kwallek's statement as an assertion of her right to remain silent, but that he viewed his additional questions to be permissible because they were "general" rather than specific. The additional questions appear reasonably likely to produce incriminating responses and therefore constituted a prohibited continuation of the police interrogation.

her desire to wait for her mother's arrival. The state points out that the relatively few statements Kwallek did make after this point did not go beyond the substance of other statements she had already made and revealed nothing that was not already known or easily discoverable through available independent sources. A review of the record indicates that the state's position is well-taken. Admission of the statements made by Kwallek in the latter part of her interview was, under the circumstances in this case, harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

Kwallek separately challenges the admission of evidence relating to those portions of her June 25 statement in which she expressed her desire to stop questioning until she could speak with her mother. Kwallek argues that admission of this evidence amounted to an impermissible comment on her exercise of the right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976); *Gunnerud v. State*, 611 P.2d 69, 75-76 (Alaska 1980). Since this argument is raised for the first time on appeal, our review is limited by the plain error rule. Alaska R. Crim. P. 47(b).

In considering Kwallek's argument, we note initially that admission of evidence showing that Kwallek wanted to talk to her mother before making further statements tended to provide the jury with an explanation for the abrupt termination of the interview, which would otherwise have been inexplicable. *Cf. United States v. Williams*, 556 F.2d 65 (D.C. Cir.), *cert. denied*, 431 U.S. 972, 97 S. Ct. 2936, 53 L.Ed.2d 1070 (1977); *United States v. Haro-Portillo*, 531 F.2d 962 (9th Cir. 1976).

Moreover, as we have already held, Kwallek's initial reference to her mother's arrival was not a clear invocation of her constitutional right and presumably the jury would not have understood it to be one. Indeed, although Kwallek's two subsequent requests amounted to an invocation of the right to silence, these requests, when considered literally, did not constitute refusals to speak. Rather, they were requests to delay further questioning for a short period of time: until Kwallek's mother arrived. Kwallek went out of her way to explain that her mother was already enroute and that any delay would therefore be minimal. She assured the troopers of her willingness to speak after her mother arrived. Thus, we do not believe that these statements lend themselves readily to the inference that Kwallek, motivated by a consciousness of her own guilt, refused to cooperate with the police. Nor does it appear to us that there is any realistic likelihood that the jury placed appreciable weight on the challenged statements as evidence of Kwallek's consciousness of guilt.

To constitute plain error, an error must affect a substantial right of the party and be obviously prejudicial. Alaska R. Crim. P. 47(b). Here, assuming admission of the challenged evidence constituted an error affecting Kwallek's substantial rights, we conclude that the error was not obviously prejudicial. *Van Hatten v. State*, 666 P.2d. 1947, 1056-57 (Alaska App. 1983). Hence, we hold

that the superior court did not err in rejecting Kwallek's motions to suppress the June 25 statement.[16]

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[16] Kwallek challenges her conviction on several additional grounds, which require only brief mention:

(a) Kwallek argues that various documents and records seized from her residence were admitted without proper authentication. We hold that the superior court correctly allowed admission of these documents under A.R.E. 901. *See* Eben v. State, 599 P.2d 700, 711 and n.28 (Alaska 1979); United States v. Mazyak, 650 F.2d 788, 792 (5th Cir. 1981), *cert. denied*, 455 U.S. 922, 102 S. Ct. 1281, 71 L.Ed.2d 464 (1982).

(b) Kwallek maintains that the testimony of Robert Stack was improperly admitted, since it had little probative value and was prejudicial. Particularly in light of the limiting instruction given by Judge Schulz, admission of this testimony did not constitute an abuse of discretion. A.R.E. 403; Lerchenstein v. State, ___ P.2d ___, Op. No. 453 (Alaska App., April 5, 1985).

(c) We find Kwallek's challenge to the propriety of the circumstantial evidence instruction to be without merit. *See* Jacobson v. State, 551 P.2d 935, 939-40 (Alaska 1976).

(d) Kwallek alleges that the superior court erred in denying the motion for judgment of acquittal. Upon review of the record we conclude that the totality of the evidence, when viewed in the light most favorable to the state, would permit reasonable jurors to differ as to whether Kwallek's guilt had been established beyond a reasonable doubt. Accordingly we find no error. *See* Dorman v. State, 622 P.2d 448, 453 (Alaska 1981).

(Continued on following page)

SENTENCE

Judge Schulz sentenced Kwallek to serve thirty years' imprisonment. The maximum permissible sentence for the offense is ninety-nine years. A mandatory minimum sentence of twenty years is also prescribed. AS 11.41.100(b); AS 12.55.125(a). Kwallek begins by challenging the constitutionality of the twenty-year mandatory minimum term for first-degree murder.[17] In *Martin v. State*, 664 P.2d 612, 620 (Alaska App. 1983), we expressly rejected an argument identical to that raised by Kwallek under article I, section 12 of the Alaska Constitution. *Martin* is controlling. We have consistently rejected arguments similar to Kwallek's other constitutional claims when they have been raised in the context of Alaska's presumptive sentencing statutes. AS 12.55.125-.185. *See, e.g., Koteles v. State*, 660 P.2d 1199 (Alaska App. 1983);

(Continued from previous page)

(3) We further reject Kwallek's related argument that the trial court erred in denying her post-verdict motion for a new trial. The motion was made on the ground that the verdict was against the manifest weight of the evidence. Having considered the entire record, we conclude that Judge Schulz, in denying this motion, did not abuse the broad scope of his discretion. *See* Amidon v. State, 565 P.2d 1248, 1262 (Alaska 1977); Maloney v. State, 667 P.2d 1258, 1267-68 (Alaska App. 1983).

[17] Kwallek maintains that the sentence violated her rights under Alaska Constitution article I, section 12 (penal administration to be based on reformation and protection of the public); she also asserts that the sentencing statute violated the separation of powers doctrine and that it impermissibly invaded the constitutional powers of the governor under Alaska Constitution article III, section 21.

Wright v. State, 656 P.2d 1226 (Alaska App. 1983); *Nell v. State*, 642 P.2d 1361, 1367-70 (Alaska App. 1982). We are equally unpersuaded by these arguments in the context of the mandatory minimum sentencing statute. We hold Kwallek's constitutional challenges to be without merit.[18]

Kwallek's final contention is that the thirty-year sentence she received is excessive. The sentencing court adopted the recommendation of the probation officer who wrote Kwallek's presentence report. Judge Schulz carefully explained this sentence in terms of the applicable *Chaney* criteria,[19] indicating that priority should be given in this case to the sentencing goal of community condemnation.

Kwallek was convicted for the intentional and apparently unprovoked killing of her husband. Murder in the first degree stands as the most serious crime found in Alaska's Criminal Code. Based on our independent review of the sentencing record, we find that Judge Schulz did not err in emphasizing the sentencing goal of community condemnation; nor do we find that the thirty-year sentence he imposed is clearly mistaken. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

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[18] We note that Kwallek received a sentence exceeding the mandatory minimum sentence by ten years. There is nothing in Judge Schulz's sentencing remarks to indicate his sentence would have been altered in any way had he been given discretion to impose a sentence lower than the mandatory minimum twenty-year term. Accordingly, there is significant doubt whether Kwallek would be entitled to any actual relief even if the arguments she has raised were meritorious.

[19] State v. Chaney, 477 P.2d 441, 443-44 (Alaska 1970).

The conviction and sentence are AFFIRMED.

SINGLETON, Judge, concurring.

With one minor exception I join in the *per curiam* disposition of the issues. I am troubled, however, by the treatment which the *per curiam* opinion and Judge Bryner's dissent give to Kwallek's claims based upon *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). *See also Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

Judge Schulz held that Kwallek was not in custody when she was interviewed in her own home at the time of the service of the search warrants. That finding was not clearly erroneous. Kwallek therefore had no *Miranda* rights to be scrupulously honored. *Beckwith v. United States*, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976).[20] Despite the absence of custody, however, the interrogating officers did give Kwallek *Miranda* warnings at some point during the very brief interview, prompting the concern with forms the basis for Kwallek's *Miranda* claim. Kwallek, whether guilty or innocent, was obviously under a great deal of emotional strain at this point. She

[20] The rule that an invocation of the right to remain silent must be scrupulously honored applies to those in custody. *See* Michigan v. Mosley, 423 U.S. 96, 99-100, 96 S. Ct. 321, 324, 46 L.Ed.2d 313, 319 (1975). Where someone who is not in custody responds to police interrogation by invoking his or her constitutional right to remain silent, the admissibility of his or her subsequent statements is measured by the test of voluntariness, not by the *Miranda* safeguards. I do not understand Kwallek to argue that any of her statements were involuntary.

initially expressed a willingness to answer police questions at her home but at various points during the brief interview wanted her mother present before answering further questions. At some point the questioning broke off; Kwallek agreed to go to the police station where she was ultimately arrested.

Kwallek submerged her *Miranda* claims in a virtual avalanche of pretrial motions; most of her pretrial claims are addressed in the *per curiam* opinion. Necessarily, Kwallek could give only brief attention to the *Miranda* issue in her presentation to the court. Judge Schulz, after taking the issue under advisement, held essentially three things: first, that Kwallek was not in custody during the interview at her home; second, that she never unequivocally invoked a right to remain silent in response to the *Miranda* warnings; and third, that even if she did invoke a right to remain silent she did not say anything significant in terms of an admission or confession during the course of the very brief interview. Judge Schulz therefore denied the motion to suppress. He made it clear, however, that he might not have fully understood the significance of Kwallek's statements or the purpose to which the state might put them at trial. I read Judge Schulz's comments as indicating a willingness to reconsider the issue if it should appear that Kwallek's responses to the officers became a significant part of the prosecution's case in chief. Looking only to the record before Judge Schulz at that time, I am satisfied that his fact findings were not clearly erroneous. During trial, a transcript of the rather innocuous interview was admitted into evidence. Kwallek's counsel objected to this procedure, renewing her pretrial objections without any elaborations.

On appeal, for the first time, Kwallek additionally contends that her various references to waiting for her mother could have led to a jury inference of consciousness of guilt and should have rejected on that basis. *See e.g., Elson v. State,* 659 P.2d 1195, 1201 (Alaska 1983). She also makes a related argument that her statements would have been understood by the jury as an invocation of her *Miranda* rights supporting an inference of guilt in violation of her constitutional rights. *See, e.g., Gunnerud v. State,* 611 P.2d 69, 75-76 (Alaska 1980). I think there is merit in the argument that the probative value of the interview in support of the state's case in chief was so weak and cumulative of other evidence that upon timely motion the evidence should have been excluded under *Elson* and Alaska Rule of Evidence 403. Since there was no objection on this ground at trial and since Judge Schulz had earlier indicated a willingness to reconsider the issue after being apprised of the state's theory of the case, it is clear that Kwallek must show plain error in order to obtain a reversal. The state did not argue consciousness of guilt to the jury or appear to recognize the significance of the interview for that purpose. Further, any invocation of Kwallek's *Miranda* rights was at best equivocal and the jury, recognizing the emotional strain that Kwallek was obviously experiencing at the time, could readily understand that whether guilty or innocent Kwallek would like to have her mother present when being interrogated. Given these circumstances it does not appear that the jury would interpret Kwallek's desire to have her mother present as indicating a consciousness of guilt. Under these circumstances, I find no plain error. I therefore join in affirming Kwallek's conviction.

BRYNER, Chief Judge, dissenting.

I am unable to agree with the *per curiam* opinion's conclusion that the violation of Kwallek's *Miranda* rights constituted harmless error.[21] Accordingly, I dissent.

I believe that Kwallek's first request to stop the interrogation until her mother arrived constituted an unequivocal assertion of her right to remain silent. If viewed in isolation, this request may – as the majority of the court concludes – seem to be equivocal. However, the request cannot properly be viewed in isolation. It was made as an integral part of a continuing interrogation and must be viewed in context.

Several factors convince me that Kwallek's initial request was an unequivocal assertion of her right to silence. Prior to the first request – immediately after being informed of her *Miranda* rights and immediately before signing a formal waiver of those rights – Kwallek had specifically asked whether she would be permitted to terminate questioning at any time after signing the waiver. Sergeants Lown and Glass assured Kwallek that she could. The police were thus realistically on notice that Kwallek was contemplating the possibility of asserting

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[21] My conclusion renders it unnecessary for me to consider whether admission of challenged portions of Kwallek's June 25 interview separately amounted to an impermissible comment on her exercise of the right to silence. *See, e.g.*, Van Hatten v. State, 666 P.2d 1047 (Alaska App. 1983). In all other respects, however, I agree with the *per curiam's* disposition of the issues and join in its opinion.

her right to silence, despite her apparent willingness at that stage to give an initial waiver and to proceed with the interview.

Moreover, the record discloses that the entry of two additional troopers into Kwallek's home during the interrogation for the purpose of executing search warrants was carefully timed so as to coincide with and intensify the ongoing interrogation. Thus, while Kwallek's request to wait was in response to the question concerning execution of the search warrants, it is manifest that the execution of the warrants was, in the understanding of all concerned, integrally related to the ongoing interrogation. Far from unexpected, Kwallek's reaction to the search warrants was predictable; her intent to terminate all questioning should have been obvious.

Furthermore, whatever the ambiguity of Kwallek's request might have been in theory, the record utterly fails to support a conclusion that the request was ambiguous or confusing in actuality. Sergeant Lown's testimony clearly establishes that he personally construed Kwallek's request as one to terminate the interrogation until she could speak with her mother.

Finally, it is significant that Sergeants Lown and Glass did not treat Kwallek's request as an equivocal statement. The troopers did not seek to clarify the meaning of this request, but rather pressed forward with the interrogation as if no request had been made at all. For the trial court to hold, under these circumstances, that Sergeants Lown and Glass scrupulously honored Kwallek's right to silence was, on this record, clearly erroneous. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602,

16 L.Ed.2d 694 (1966). *See also Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975).

Upon reviewing that portion of Kwallek's interview that occurred after she initially asked to wait for her mother, I cannot say that admission of these unlawfully obtained statements was harmless beyond a reasonable doubt. It may well be true that much of the substantive information stated by Kwallek in this portion of the interview was cumulative. If this were all there was to it, a harmless error finding might be tenable.

Yet far more damaging to Kwallek than anything she said was what she did not say. The admission into evidence of the illegally obtained portions of Kwallek's interview disclosed to the jury two separate instances in which Kwallek, when pressed for potentially incriminatory details ceased being cooperative and asserted her right to silence.[22] The unmistakable and in all likelihood indelible impression created by this evidence is that Kwallek had something to hide – that her refusal to speak was motivated by the consciousness of her own guilt.

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[22] My analysis assumes, without deciding, that admission into evidence of Kwallek's initial request to wait for her mother would have been permissible in order to give the jury an understanding of the manner in which the interview was terminated. *See* United States v. Williams, 556 F.2d 62 (D.C. Cir.), *cert. denied*, 431 U.S. 972, 97 S.Ct. 2936, 53 L.Ed.2d 1070 (1977). Surely, however, admitting evidence of Kwallek's two subsequent requests to wait for her mother could not be justified on this theory. Having heard Kwallek end the interview once, the jury had little legitimate need to hear her end it again and again.

Even assuming that admission of evidence of Kwallek's refusals to continue with the interview did not pose independent constitutional problems, the probative value of the refusal evidence as proof of consciousness of guilt was virtually nil. Conversely, its potential for prejudice was extremely high. *See, e.g., Elson v. State*, 659 P.2d 1195, 1201 (Alaska 1983); *Doisher v. State*, 658 P.2d 119 (Alaska 1983); *Dorman v. State*, 622 P.2d 448, 459-61 (Alaska 1981); *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980); *Blue v. State*, 558 P.2d 636, 645 n.21 (Alaska 1977); *Puller v. Anchorage*, 574 P.2d 1285 (Alaska 1978). *Cf. Coleman v. State*, 658 P.2d 1364, 1366 n.2 (Alaska App. 1983).

Kwallek's case was an extremely close one. Almost all of the state's evidence against Kwallek was circumstantial. The state showed a possible motive and a clear opportunity, but there was little evidence to implicate Kwallek directly. In the face of the state's evidence, Kwallek, from the inception of the investigation through the conclusion of her trial, steadfastly and consistently maintained her innocence. With one exception, she had always appeared forthright and willing to cooperate. The sole exception was her refusal to speak with Sergeants Lown and Glass during the June 25 interview.

Because the trial court admitted those portions of the June 25 statement that were obtained in violation of Kwallek's right to silence, the jury heard three successive instances in which Kwallek refused to speak. In practical terms, the impact of this evidence could readily have been devastating. This evidence might have made the difference between the finding of a reasonable doubt and

the jury's willingness to convict Kwallek. Accordingly, I cannot join the *per curiam* opinion in concluding that admission of the illegally obtained evidence amounted to harmless error.

APPENDIX E

IN THE COURT OF APPEALS OF
THE STATE OF ALASKA

Court of Appeals No. A-31

PATRICIA KWALLEK,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

O R D E R

(Filed August 16, 1985)

Superior Court No. 1KE-82-637 Cr.

Before: Bryner, Chief Judge. Coats and Singleton, Judges.

On consideration of the petition for rehearing filed August 8, 1985.

IT IS ORDERED:

The petition for rehearing is denied. However, the language of subsection (b) of footnote 16, page 27 " . . . the limiting instruction given by Judge Schulz" is amended to " . . . the limiting instruction proposed by Judge Schulz."

Entered by direction of the court at Anchorage, Alaska on August 16, 1985.

CLERK OF THE COURT OF APPEALS

/s/ Pamela J. McIntire
Chief Deputy Chief

ccs: Counsel

APPENDIX F

IN THE SUPREME COURT OF
THE STATE OF ALASKA

Supreme Court No. S-1145

PATRICIA KWALLEK,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

O R D E R

(Filed November 4, 1985)

Court of Appeals No. A-31

Superior Court No. 1KE 82-637 Cr.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing, filed on September 3, 1985, and the response to the petition, filed on September 23, 1985,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on November 1, 1985.

CLERK OF THE SUPREME COURT

/s/ Pamela J. McIntire
Acting Clerk of Court

[Rabinowitz, Chief Justice, and Moore, Justice, dissent. They would grant the petition as to the issue of failure to break off questioning when requested to do so.]

ccs: Justices
Counsel
Court of Appeals Judges
The Honorable Thomas E. Schulz
Appeals Deputy Clerk, Juneau Trial Courts

APPENDIX G

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA KWALLEK, Petitioner-Appellee, vs. ROGER V. ENDELL, Commissioner; HAROLD BROWN, Attorney General of the State of Alaska, Respondents-Appellants.	)	No. 88-3948 D.C. No. CV-A86-274-HRH (Filed Aug. 4, 1989)

APPEAL from the United States District Court for the ___ District of ALASKA (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ___ District of ALASKA (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ___ judgment of the said District Court in this Cause be, and hereby is REVERSED.

cy; Dan Westerburg
Cynthia Hora (AAG)
Judge Holland
Mag. Jamin

Filed and entered May 18, 1989

APPENDIX H

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA KWALLEK, Petitioner-Appellee, v. ROGER V. ENDELL, Commissioner; HAROLD BROWN, Attorney General of the State of Alaska, Respondents-Appellants.	No. 88-3948 D.C. No. CV-A86-274-HRH ORDER (Filed July 25, 1989)

Before: REINHARDT, KOZINSKI and TROTT, Circuit Judges.

Judges Kozinski and Trott vote to deny the petition for rehearing. Judge Reinhardt votes to grant the petition for rehearing. The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

PATRICIA KWALLEK,

Petitioner,

v.

JUDGMENT IN A CIVIL CASE
(Filed June 14, 1988)

ROGER V. ENDELL, Commissioner of the Department of Corrections, and HAROLD BROWN, Attorney General of the State of Alaska,

CASE NUMBER: A86-274

Respondents

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT A writ of *Habeas Corpus* shall issue in favor of petitioner if she is not retried within 120 days from the entry of judgment.

APPROVED:

/s/ H. Russel Holland
U.S. District Court Judge

June 13, 1988
Date

JoAnn Myers
Clerk

cc: O&J 3376
D. Westerburg
(BIRCH)
C. Hora (AAG-318)

/s/ Illegible
(By) Deputy Clerk

APPENDIX J

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
AT KETCHIKAN

STATE OF ALASKA

Plaintiff,

vs.

PATRICIA LOUISE KWALLEK,

Defendant.

DOB: 12-08-38

CASE NO. 1KE S82-637 CR

JUDGMENT AND COMMITMENT

The defendant came before the Court on June 14, 1983, with his counsel Daniel Westerburg and the District Attorney present. The defendant has been convicted upon finding of guilty by jury of the offense(s) of Murder in the First Degree as charged in Indictment and has been given full opportunity to make a statement in his own behalf.

IT IS ORDERED that the defendant is hereby committed to the care and custody of the Commissioner of the Department of Health and Social Services, State of Alaska, or his authorized representative, for a period of Thirty (30) years A.S. 12.55.125 (a).

It is recommended that: –O–

Any defendant who has received a sentence of more than forty-five days may appeal the sentence on the ground that it is excessive. Upon such appeal made by a defendant, the Supreme Court of Alaska may increase or

decrease the sentence and sentence the defendant to any term which might have been imposed by the trial judge.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the Commissioner of the Department of Health and Social Services of the State of Alaska, or his authorized representative.

June 14, 1983
DATE

Thomas E. Schulz
JUDGE

APPENDIX K

STATEMENT OF PATSY KWALLEK

We're not on tape, ah the time is 1:48 p.m. Today's date is 6/25/82. We're at the KWALLEK residence, Mile 11 North Tongass, Ketchikan. Present are Patsy KWALLEK, and Sgt. Robin Lown, Alaska State Troopers, and Sgt. John Glass, Alaska State Troopers.

Q: Ah, Patsy we have just had Sgt. Rogers bring you back to your residence from ah, the JAHNKE residence, do you understand, realize that you're not under arrest?

A: Yeah.

Q: Okay. You understand that you're free to get up and leave anytime you wish?

A: Yep.

Q: And that you're not under arrest at this time, so you do have the option getting and leaving. Patsy we want to go back and talk ah, some more about what happened here at the house yesterday morning, and maybe what has happened over the last couple of weeks. Ah, we've got reason to believe that there, everything that you've told us is not exactly the way things happened.

A: I'll try to help anyway I can.

Q: Okay. Well I think we have a story that needs to be told and in order for us to ah, help you and to be of any service to you, we've got to know the true story, of what happened yesterday morning.

A: I'll help you if I can.

Q: Why don't you tell us again what happened here yesterday morning, Patsy.

A: I got up about 6:30, fixed his lunch like I always do. I got out clean clothes for him. Changed everything over in his billfold. He did his exercises. (inaudible) then he was looking out the window. I got the dogs out, I called them back in. I always open the door for him, cause he has a cup of coffee in one hand and his lunch sack in the other. I told him good-bye, and I had come back in and I heard they were like pop noise, and I heard him screaming my name, and I went out and looked for him.

Q: Then what happened Patsy?

A: I come back in to call the ambulance when I found him, and I was on the phone screaming at them, the doors were back by the bedroom door there, and they barked at me and there was like ah, ah, squeaky, creak, creaky bong noise, and I just went back outside.

Q: Do you know what the squeaky bonk noise was?

A: No I don't.

Q: When you talked to me yesterday about it, you said that it was a noise that you had heard before.

A: I think I have heard it before, but I do not know what it was.

Q: Do you have any idea what it might have been?

A: No. Somebody asked me if it could be a file cabinet, but it wasn't a noise like a file cabinet.

Q: Well Patsy we don't think that's exactly what happened here yesterday.

A: That's . . . just what happened. (inaudible)

Q: We have reason to believe that something else might have happened here yesterday, Patsy and that you knew more about it than what you're telling us.

A: I don't think so, I know what happened.

Q (Lown): Is there a ah, .22 caliber weapon in the house?

A: She, he's got either two or three 22 pistols, I think only two, and there's an old 22 rifle.

Q (Lown): Where's the old 22 rifle kept?

A: He keeps it here in the, in the gun cabinet.

Q (Lown): Where's the last time you saw that gun?

A: Oh, I really don't us it too often.

Q (Lown): You know what kind of rifle it is?

A: No, it just, it's just ah, I think it's an automatic. Ah, hotshot, and I can't remember when the last time we took it out. We don't use it too much.

Q (Lown): Is it normally kept loaded?

A: Not unless it would have been put away loaded, we then normally keep unloaded around here. In fact, I don't even know if he keeps his 44 loaded anymore because of the Brand kid deal, we always kept a pistol or something loaded, in the house.

Q (Lown): Now, you're saying that you went outside and you didn't see anybody?

A: I didn't see a soul. Not one soul.

Q (Lown): Whe, when you heard these pops where did they sound like they were coming from?

A: Just outside, but really I didn't pay any attention. They were pops sorta like they remind me what we hear when they shoot up the gun club, and we don't pay any attention to that cause they shot up there morning and the night.

Q (Lown): How long after you heard these pops did you go to the door?

A: When I heard him screaming.

Q (Lown): How long was that?

A: I really don't know. I was back and physica in here, and I heard him scream my name and I went running out there.

Q (Lown): What was it a long time?

A: No it wasn't very long, I'm sure.

Q (Lown): Was it more than ah, a minute?

A: I don't know, I really don't know. I can remember I had a towel in my hands.

Q (Lown): And you heard these three pops . . .

A: I don't even know how many pops I heard, they were just like, like pop noises.

Q (Lown): Okay you heard some pops, and then you immediately went to the doorway . . .

A: No, I was standing here, I, gues, I just heard these pop noise and I hear, heard Spader screaming, Patsy and I went out there and trying to find him.

Q (Lown): You have no recollection of all of how long after these pop noises before he started screaming?

A: No I don't. I just really pay any attention.

Q (Lown): And you didn't see . . .

A: To those pop noises.

Q (Lown): And you went out, see it I got this correct now, you went out down the stairs looked towards the truck, is that correct? You didn't see anybody?

A: Yeah, I walked around the front of the pick-up, his cup was laying there in the, in the road and I walked all around it, he was laying up against the side of the, the shop building there.

Q (Lown): You didn't see anybody else?

A: I didn't see anybody, they asked me if I heard anything, as far as cars . . .

Q (Lown): Okay.

A: I just . . .

Q (Lown): Did you go back, immediately go back into the house?

A: I now that I as I sort ah, looked at him, I come running back here into the house and I got on the telephone, call, I had to dial twice, I can remember

that. And the dogs were barking, and the only noise that I heard was this drawers that I told you about, I don't know what it was.

Q: Patsy did you hear any pops after the initial ones?

A: Not that I remember, I. She asked me a couple of things, she wanted to know the fire number and I couldn't remember the fire number I was telling her that it was, who we were and finally I said I think it's 118.

Q (Lown): Now Patsy you were wearing a ah, ah, robe and what color is that robe?

A: I think I had on a white one yesterday morning.

Q (Lown): Okay is this the kind that you slip over your head and zip up the front?

A: Umuh (yes).

Q: (Lown): Okay is that robe still in the house?

A: It should be.

Q (Lown): Okay; ahm, was there any occasion that you had while, yesterday, while wearing that robe to be in the attic?

A: No.

Q (Lown): None at all?

A: No. I wasn't in the attic yesterday. Ta . . .

Q (Lown): So you changed that robe after we had arrived and you were going to go the JAHNKE house, you changed that robe?

A: Umuh (yes).

Q (Lown): What did you do with the robe?

A: I think I left it in the bedroom.

Q (Lown): Okay. Patsy before we go any further, ah, we're obligated to advise you of your constitutional rights.

A: Okay.

Q (Lown): And I'm going to read this to you, I'll fill in the place, date and time. And your last name is spelt K . . .

A: WALLEK.

Q (Lown): Okay, the place is at the KWALLEK residence, the time, or the date is 6/25/82, and the time now is 1:56 p.m. Before we ask you anymore questions you must understand your rights. You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. If you can not afford a lawyer one will be appointed for you before any questioning if you wish. You can decide to answer questions now without a lawyer present, you still have the right to stop answering at anytime. You also have the right to stop answering at anytime until you talk to a lawyer. Do you understand that?

A: Yep.

Q (Lown): Okay. What I would like you to do, Patsy, is read these on you own here, right down to here, so

we can be absolutely sure that you understand what we're, what we're telling you. Do you understand each and everyone of those?

A: Yeap.

Q (Lown): Would you do me a favor, Patsy, and just in front of this would you put you initial, so I'll know that you read'em and understood'em. Would you do that for me please? Okay you also understand this one, and these other three here that aren't right out to the margin here. Do you understand these three too?

A: Umuh (yes).

Q (Lown): Okay. Would you initial those three also, please? Okay this next statement below that is a waiver of rights, and it states: I have read this statement of my rights, and understand what my rights are, I am will to make a statement and answer questions. I do not want a lawyer at this time. I understand and know, that I, what I am doing. NO promises or threats have been made to me, and no pressure or coercion of any kind has been used against me. Do you understand that?

A: Um (yes).

Q (Lown): What I'm going to ask you to do Patsy, is for us to continue talking to you we would like you to sign this particular statement indicating that you understand it and that you're willing to continue to talk to us. Do you understand that?

A: Can I still stop then if I want to?

Q (Lown): Certainly, that's what it says.

A: Anytime I want to.

Q (Lown): Yes, that what, that's what the waiver says.

A: Okay.
(sounds of writing in the background)

Q (Lown): Okay the time now is 2:00 o'clock p.m., and I'll sign it here as a witness and Sergeant Glass will also sign it here, as a witness. Okay, Patsy the reason we do this is because we're, we're required to. It's a requirement in order for us to talk to you, that we advise you of your rights. And you do understand your rights?

A: Right.

Q (Lown): OK. Patsy ah, now you, I asked you a little bit earlier about this, this rifle .22 caliber rifle . . .

A: Umuh (yes).

Q (Lown): . . . okay, and you say it's normally kept in the ah, . . .

A: Gun cabinet.

Q (Lown): gun cabinet right here in the hallway?

A: Umuh (yes).

Q (Lown): Okay. Ah, is there any reason why that would be moved?

A: It shouldn't be, but (inaudible) reason to, we keep the rifles here. We kept a pistol in the dresser drawer, and we keep the other one in the file cabinet.

Q (Lown): Would you, would it be fair to say that ah, ahm, that, that rifle would normally be stored unloaded?

A: Normally it is.

Q (Lown): Okay, do you. . . .

A: The only time that rifle has ever been taken out around here, is a couple of times Spade's taken it out shot at a rat. He knows he shouldn't because it's close to people, and it's too close to the highway.

Q (Lown): Okay. Ah, have you ever found that rifle loaded? In the gun cabinet?

A: Umuh, never looked to see if it was loaded.

Q (Lown): To the best of your knowledge it would normally be unloaded?

A: Um(yes) we normally put everything away unloaded. There are times a gun has been brought in loaded.

Q (Lown): Do you remember what kind of rifle that was?

A: All I know is it's a 22. I don't know the brand on it.

Q (Lown): What ah, what kind of a stock does it have?

A: What is a stock look like (inaudible both are talking)

Q: (Lown): Brown wooden stock?

A: Brown color of some kind like, you know, like all different stocks are.

Q (Lown): Okay just a standard brown wooden stock. Ahm, do you remember what kind of a magazine it has, where you put the bullets in?

A: Sir, the tube one.

Q (Lown): It's a tube feed?

A: Umuh (yes).

Q (Lown): Okay. Okay, Patsy, ah, would there any be, be reason for that weapon to be in the attic?

A: None whatsoever.

Q (Lown): None whatsoever. Were you, and I think I asked you this earlier, were you in the attic yesterday?

A: No I wasn't in the attic yesterday, or in the attic the day before, I was in the attic the day before, I was on the attic the day before.

Q (Lown): You were in the attic the day before that?

A: Umuh (yes).

Q (Lown): Do you remember what you were wearing when you were in the attic the day before?

A: No. (pause) Probably my robe.

Q (Lown): Okay.

A: Went up there looking for stuff, in fact, last couple of days I left the attic door open, so hot up there, hoping that it would cool off a little.

Q (Lown): Okay.

A: Besides that I was silly, that wouldn't help a least bit, if I wanted to go ahead.

Q (Lown): Umuh (yes). Okay, ah, . . .

A: And stuff drifts down so bad when you leave it open, but . . .

Q (Lown): Did you leave the attic open yesterday?

A: Ah, was didn't do yesterday.

Q (Lown): The day before?

A: A: (inaudible)

Q (Lown): Did you leave it open?

A: Uhuh (yes).

Q (Lown): You did leave it open the day before?

A: Closed it up, uhuh (yes).

Q (Lown): Did you close it at night?

A: Spader closed it up, I think, or I did, I can't remember what after a bad time around here. He came in, we'd been working out there and he came in, we were sorting through somemore of those ah, cases Ben gave us, cause he gave us a whole, we'd been trap shooting a lot. He gave us a bunch of paper ones and we'd been sorting through those, because Spader can't find the load that, I don't know, if it's a trap loader or what, and he didn't said he didn't think we were going to be able to beat it so.

Q (Lown): Okay, you say you've had no problems with ah, with your husband. . . .

A: No.

Q (Lown): . . . as far as arguments or anything like that?

A: If Spader does get mad, he gets mad for a few minutes and then he gets over it.

Q (Lown): He doesn't, doesn't hold a grudge about anything?

A: Nope. He just wants his say and then he's fine.

Q (Lown): Okay. Ah, have you been, been having any money problems recently?

A: I'm behind in a whole bunch of things.

Q (Lown): Is there any reason why you should be?

A: Just because I don't manage right, and I haven't been working.

Q (Lown): Did that annoy your husband?

A: It, if anything doesn't get paid it annoys him.

Q (Lown): Do, do you recall how much your behind and on what?

A: Well I'm mers paid, we're behind on our taxes. I'm going to have to tell him about that.

Q (Lown): Do you know how much dollar amount you are behind?

A: Umuh (no), umuh (no).

Q (Glass): When are the taxes due Patsy?

A: When it where ah, ah, the 80 taxes.

Q (Glass): For 80 taxes?

A: Umuh (yes).

Q (Glass): When did you quit working at Southeastern Electric?

A: In May of ah, a year ago. May of ah, 81.

Q (Glass): 81. Has your financial troubles ah, started after that?

A: Most of them.

Q (Glass): Did Spade get upset over the fact that you were having financial problems?

A: Yes he gets upset over it.

Q (Glass): Was he, wa, aware of all the financial problems?

A: No he wasn't.

Q (Glass): Did you keep these financial problems from him?

A: Yes, I did.

Q (Glass): Was there a reason for that?

A: Cause he gets so upset over it. I just, I'm going to have to sit down and talk to him cause he'll do one of two things, he'll either get everything straightened up or he'll says that we'd just better go our separate ways, that's just the way he is.

Q (Lown): Have you had any medication today?

A: No, they gave me something last night, just, you know . . . , just want to sleep.

Q (Glass): Were you sleeping when Sergeant Rogers come up to get ya?

A: Umuh (yes).

Q (Lown): Okay, well, what we have here Patsy, we have a couple of search warrants for your house.

A: Okay.

Q (Lown): We have a search warrant here and you might want to read it. This is your copy of it, for you nightgown, or your bathrobe, or robe . . .

A: (inaudible).

Q (Lown): and for a sample of insulation out of your attic, we also have a search warrant here for bank and bookkeeping records of your husband and yourself.

A: Okay.

Q (Lown): You are, you have now been served with copies of each of these search warrants. We're going to have the Troopers outside, who are investigators from Anchorage come in and conduct this search. do you have any questions about that?

A: No. I think I should wait and talk with my mom gets here before I say what to do.

Q (Lown): Okay.

Q (Glass): Was Spade upset yesterday, Patsy when he left for work?

A: No he said good morning, joked ah, he's back's been feeling good because of the sun. Bothering was his

ankle and his toe, he, he's got bad ankles, and they, he turns them and they hurt. And his toe gets sorta swollen and his ankle when he takes his shoes off.

Q (Lown): Do you remember what happened yesterday morning?

A: Ah, the same thing that happens every single morning, he (pause) . . . .

Q (Glass): Wasn't yesterday morning a little different, Patsy?

A: No. Other than what happened, it wasn't any different between Spader and I.

Q (Glass): Well Patsy we found the rifle in the attic.

A: Oh, no reason for a rifle to be in the attic.

Q (Lown): We found the bullets in the rifle that matched the ammunition in the reloading room. We recovered a bullet from the body of your husband that matches the bullets in the rifle . . .

A: Umuh (yes).

Q (Lown): . . . we recovered the casings from the spent cartridges right outside you front door.

A: Umuh (yes). I didn't see anybody outside the front door.

Q (Lown): Patsy, there was something more going on that what's you're telling us about. Your husband and we've heard this from several people, was not just a little bit mad, about loosing his boat slip, he

was extremely mad about it. He was extremely mad because the bill hadn't been paid, because something you were suppose to do, you had not carried through with.

A: That's right but he said when they took the, the deposit and then that covered it, and then the stall should still be ours.

Q (Lown): Well checking the records with the ah, boat harbor people, indicated that the bill was not paid.

A: Well that's what they say but yet . . .

Q (Lown): We've also checked other people in town, ah, the building company, ah, the people that hauled in the gravel out here, for your shop that he was building, none of those bills were paid.

A: Not yet they haven't been.

Q (Lown): Why hadn't those bills been paid?

A: (inaudible) At this point there's no money to pay for them.

Q (Lown): Now Spade was ah, who everybody we've talked to was a very, very punctuatal person about paying his bills, I mean he prided himself on paying his bills all the time. He prided himself on being current and never being behind . . .

A: Umuh (yes).

Q (Lown): . . . times on bill . . .

A: Umuh (yes).

Q (Lown): . . . and all of a sudden he wakes up and find himself, people aren't delivering supplies that

he wants unless he pays cash. Now apparently it appears that he thought all these bill were paid. Is there any reason why he would thinks these were paid and they weren't?

A: Because I hadn't told him anything.

Q (Lown): Well ah, he's the one who provides the income, is, isn't that correct?

A: Umuh (yes).

Q (Lown): And ah, he knows how much money he makes doesn't he?

A: Umuh (yes).

Q (Lown): Does he receive a paycheck?

A: Umuh (yes).

Q (Lown): So he would know if there was money to pay the bills, is that correct?

A: (pause) Umuh (yes).

Q (Lown): It is correct? So he assumed the bills were paid, he would know if there was money present or not, so he would have to assume that there was money enough to pay the bills.

A: Umuh (no).

Q (Lown): There wasn't money enough to pay the bills?

A: (no verbal response).

Q (Lown): How come?

A: There just wasn't cause it was gone.

Q (Lown): What happened to it?

A: I will talk when my mom gets here, she can help.

Q (Glass): You want to wait until your mom gets here to talk to us?

A: (inaudible both are talking) she should be here in just a little while. Chris is getting her now.

Q (Glass): Do you want to talk to us then, Patsy when she gets here?

A: Uhuh (yes). Is it be that okay?

Q (Glass): Sure.

Q (Lown): Sure, that's fine.

Q (Glass): In the mean the time we'll just sit here and wait, and let the other two investigators go ahead and ah, maybe you can tell us where the ah, bank records ah, are? Do you have a checking account Patsy?

A: Umuh (no).

Q (Glass): No checking account? How do you keep track of your ah, bills?

A: Spader keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

Q (Glass): You don't have a checking account?

A: No.

Q (Glass): has he ever had a checking account?

A: No.

Q (Glass): Ah, your, your background Patsy and your training has been in bookkeeping is that correct?

A: Umuh (yes).

Q (Glass): Do you keep any kind of books at all? On the money spent out?

A: Umuh (no). No.

Q (Glass): Who come that is?

A: I don't know I just, mom gets here we'll talk about it.

Q (Glass): Okay. At the time is approximately 2:14 p.m. we'll go off record.

APPENDIX L

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Fifth Amendment: No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA STATUTES

Alaska Statute 11.41.100. Murder in the First Degree.

(a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, he

1) causes the death of any person; or

2) compels or induces any person to commit suicide through duress or deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

FEDERAL STATUTES

28 U.S.C. § 2254. State Custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual

issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceedings;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the

State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

RULES OF COURT

Rule 47(b) of the Alaska Rules of Criminal Procedure: Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX M

TRANSCRIPT EXCERPT OF TRIAL COURT'S RULING ON MOTION TO SUPPRESS

* * *

[Judge Schulz] The Motion to Suppress the statements made by Ms. Kwallek on the 25th, the day after the death of her husband, is raised on the basis that she was not given any *Miranda* warning until some time after the interview had started. And I read through that interview a couple of times, and the defendant, in her memorandum, was talking in terms of minutes. I can't tell from the transcript how long it was before the *Miranda* warnings were given, but I -- it was some time after the interview began, and then at a later time in the interview Ms. Kwallek indicated that she wanted to talk to her mother. It is not clear to me, as it apparently was not to the State, what she wanted to talk to her mother about. I say that because at the time that comment was made she had just been advised that other officers were present and they were going to execute some search warrants in the residence. And I can't say for sure whether she wanted to talk to her mother about that or about continuing the interview. I'm going to assume for the purposes of this decision that at that point she indicated – she was indicating that she wanted to talk to her mother about whether or not she would proceed with the interview, but I don't think it really makes any difference. All she answered after that were some questions concerning her background and age, as I remember, and then the interview, in fact, was terminated and she was taken to the Alaska State Trooper headquarters, where she waited for a length

of time that I cannot determine for the arrival of her mother, and sometime after that she was in fact arrested.

Whether or not she should have been given the *Miranda* warnings I think is probably controlled by the *Hunter* case. That Court set down an objective standard to be used in determining when those *Miranda* warnings should be given. I don't think the parties quarrel at all about what law applies. In this case there doesn't seem to be dispute over some, I think, determinative facts. First, Ms. Kwallek was taken from, my recollection is the Jenck residence, where she'd been staying since sometime in the morning of her husband's death, back to her residence, where she was interviewed in the kitchen by two troopers who were not in uniform. As near as I can tell from – again, from the affidavits and the evidence, she was in her own kitchen; there is no evidence that they were drinking coffee or anything, but she clearly was allowed to smoke. I haven't listened to a tape; the transcript indicates that the – to me, that the interview was fairly low key. The officers did pursue vigorously, a couple of times I guess, their idea that she wasn't telling them everything she knew. But on the whole, the interview was – it didn't appear to me to be overly aggressive at all. The other officers that came to execute search warrants that had apparently been issued by Judge Keene were also not in uniform, and were in another part of the house, out of her sight and out of her hearing, and there's no indication at all that she was bothered by their presence.

So, she came to her residence in response to a request by the Troopers, and she was transported by a Trooper. And I guess under *Hunter* that's some evidence that she

was in custody. She was told that she was not under arrest; and she was told that she could leave at any time, and she indicated she understood that. While it's true that the Troopers testified at the evidentiary hearing that if she had tried to go, they probably would have stopped her. Under *Hunter* I don't think that makes any difference. I think it's the evidence, or the indications that were perceived by the defendant and a reasonable person's reaction to those, that is important. And in this case she was in her own home; she was told that she was not under arrest and she could leave any time she wanted to. And I think under the test in *Hunter* and the balance out of that, you have to come to a conclusion that she was not in custody. If she was not in custody the *Miranda* warnings were not required. But, as I indicated earlier, they were given and the interview was broken off within – it couldn't have been more than a few minutes, after some questions that I don't really know what their relevance is. It may become apparent in the next couple of weeks, but right now they don't mean much to me. At any rate, though, after she answered a few more of those questions the interview was terminated and she wasn't asked any more. I'm going to deny the Motion to Suppress those statements.

* * *

APPENDIX N
TRANSCRIPT EXCERPTS FROM TESTIMONY OF STEVE NEITZKE AND LOU ANN COTTLE

Steve Neitzke

* * *

(p. 918) Q [Defense Counsel] Okay. Now, do you recall the events of the morning of June 24th?

A [Mr. Neitzke] Yes, sir. I do.

Q Okay. Why don't you just tell us what happened as best you can recall, starting with the time that you woke up that morning?

A I had been awake earlier in the morning and had gone back to sleep, and as I awoke I felt that it was important for me to become awake very rapidly, that there was something dramatic happening. The first sounds that I was distinguishing were the screeching and screaming of an obviously terrorized female. However, that screeching and screaming was associated with at least 2 dogs barking; at least 2 men shouting at each other. There was a virtual bedlam of noise.

Q Let me stop you right there. You said 2 men shouting at each other. What makes you sure that it was 2 men shouting?

A The 2 male voices were differently pitched. The words, (p. 919) indistinct as they were, were overlapping. It was easily distinguishable as 2 men shouting at each other or at something else.

Q What was the tone of their voices? Was it. . . .

A The tone was of anger, initially. Within just a couple of seconds one of those 2 voices changed from anger to a pleading or begging kind of tone.

Q Were you able to distinguish any of the words at all?

A None.

Q Okay. What happened after the one male changed the tone of his voice?

A Very quickly the first of 2 shots was fired. The second shot came casually after the first. I've characterized the space in between as being easily available for a single action revolver.

Q What's a single action revolver?

A That's where – that's a revolver on which you must cock the hammer physically with the thumb before firing it a second time. I'm not, of course, saying that it was necessarily a single action revolver, I'm just characterizing. . . .

Q Talking about the timing?

A . . . .the timing.

Q Okay. What happened then. You heard the 2 shots. What's the next event?

A All noise stopped. I mean I could hear no voices, no dogs (p. 920) barking, I mean I just – I could not hear anything from where I was laying in my bed. I immediately got up, picked up my wristwatch from a nearby table, looked at it, it said 7:25 a.m. I put it on my wrist, picked up my trousers, picked up – got into them, picked up a nylon shell jacket that was laying

alongside of 'em, and kind of half walked and half trotted down the length of the clubhouse. As I was moving down the length of the clubhouse, I was physically moving away from the scene of the crime. At the time I thought I was moving towards the scene of the crime.

* * *

(p. 922) Q Okay.

A There was nobody there [beside the clubhouse], and I was astounded. I didn't know where else that the sound could have come from. I walked away from that window, going back towards my bed, and there were 3 shots fired in very rapid succession. The quality of the sounds of those 3 shots were such that I identified them as having come from the same weapon.

Q As the first shot you heard?

(p. 923) A As the first 2 shots that I heard.

Q Okay. And, could you tell what direction that those shots were coming from?

A Yes. From having spent many weeks in the Rod & Gun Club, and especially in relationship to that open window in the hot weeks that preceded June 24th, I knew that the sounds were coming from the direction of the highway. Sounds coming from that direction were most clearly heard, I assume, because some kind of an acoustical bowl effect that that rock pit has in relationship to the clubhouse.

* * *

(p. 924) Q Okay. Would you – let me ask you again. What direction did that sound come from? The shots that you heard. Generally – general direction. I want you to pinpoint it if you can.

A From my previous experience with the way sound traveled to that window, I immediately assumed that it came from the direction of the Kwallek house.

Q At the time you didn't know?

A I didn't know exactly where their house was, but that was the direction from which sound had traveled to me before.

Q Okay. Let's go back again about the voices that you heard. You said you heard a female voice that was screaming?

A Yes.

Q What was the quality of that scream? Was that another angry shouting, or. . . .

A No. It was quite different from the angry shouting of the (p. 925) men. It was terror, anguish. The screaming and screeching, somewhere in between the 2, sounded to me as – as if she were trying to say words. Trying to articulate words. There were garbled stops between the screeches. Obviously, as I said before, I could not determine – could not distinguish. . . .

Q Any words at all?

A . . . . any individual word.

Q Sure. And the 2 men again, could you tell if they were arguing with each other, or with someone else, or. . . .

A Obviously not.

Q But they were. . . .

A It sounded very much as though they were shouting at each other. That was the impression that I had.

* * *

Lou Ann Cottle

* * *

(p. 697) Q [Prosecutor] Calling your attention specifically to June the 24th, in the early morning, do you recall hearing some shots that morning?

A [Mrs. Cottle] Yes.

Q All right. Why don't you explain what you were doing and what you heard?

A Okay. I had gotten up at 6:30 because I was going to do (p. 698) some taping, and I made sure that the player was playing correctly and then I went back to bed and did some studying. And I would assume that it was about quarter to 7 when I went back to bed, and it was about 7:00 o'clock when I heard the shots.

Q Okay. Could it have been later?

A No, I don't feel it could have been too much later, because after the shots people were going to work, and they usually start leaving at 7:30.

Q All right. So you were in bed studying when you actually heard the shots, is that right?

A Yes.

Q Okay. And how many shots, if you recall, did you hear?

A Five.

Q Five shots?

A Yes.

Q Is that total, or at first?

A That's total.

Q Did you year 2 sets of shots?

A Yes.

Q All right. The first set, do you recall how many you heard?

A I heard 3 shots the first time.

Q Okay. Did you hear anything after those first 3 shots?

A Yes. I heard a male voice saying "What are you doing, I haven't done anything."

(p. 699) Q Was he saying that in a normal tone?

A No, he was shouting.

Q All right. Then did you hear any other – other. . . .

A And then I heard – I heard another male voice say "What's going on here', and then I heard 2 more shots.

Q Okay. Are you sure that it was definitely another male?

A No. I'm assuming from what was said that it was. . . .

Q That it was another male, all right. You didn't hear any other yelling or screaming between the 2 sets of shots, did you?

A No.

Q Any woman's voice?

A No.

Q Anybody yell the name Patsy or Trish?

A No.

Q Okay. After you heard that exchange – heard the men's voices, you indicated you heard some more shots?

A Yes, 2 more.

Q Two more shots?

A Yes.

Q All right. Anything after that?

A No.

Q Did you do anything after you heard the shots?

A After I heard the last 2 shots I got up and looked out the window, and I didn't see anything.

* * *

(p. 701) *Cross Examination* Q [Defense Counsel] Mrs. Cottle, was your window – bedroom window open that morning?

A Yes, it was.

Q Were the sounds fairly clear then, coming in?

A Yes.

Q Did you think anything was unusual when you first heard the shots, anything out of the ordinary?

A Not when I heard the first 3.

Q Okay, and why is that?

A Because the rifle range is back there somewhere. I've never been to it, but there is a – a rifle range.

Q Have you heard shots there in the past?

A Yes.

Q Okay. And what was your – you said you heard 2 male voices. What was your impression at the time? One male, or 2 separate males?

A Two separate males.

Q Two separate males. And that was – why do you say that? Why (p. 702) did you come to that conclusion?

A From the conver – from what I heard the fi.st male say, and then from what the second male said.

Q Okay. What was the time lapse between the first 2 shots and the second – or the first 3 shots and the second 2 shots?

A No more than 15 seconds.

Q Okay. And all this happened sometime after 7:00 a.m. on June 24th?

A Yes.

Q And was the shouting coming from the direction of the Kwallek residence?

A Yes.

* * *

Supreme Court, U.S.
FILED
DEC 15 1989
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No. 89-511

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

PATRICIA KWALLEK,
Petitioner,

vs.

ROGER ENDELL, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, and HAROLD BROWN, ATTORNEY GENERAL OF THE STATE OF ALASKA
Respondents.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals err in concluding that any error in the admission of Kwallek's pre-arrest interview with the troopers was harmless beyond a reasonable doubt in light of the strong evidence of guilt and the fact that Kwallek's attempt to explain away this strong evidence was "patently contrived"?

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JURISDICTION

Kwallek has received a judgment from the Ninth Circuit Court of Appeals. This Court's jurisdiction is properly invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

A. Introduction

Patricia Kwallek was convicted of first-degree murder in the superior court of the State of Alaska. After the state appellate courts affirmed her conviction, Kwallek petitioned for a writ of habeas corpus in the federal courts, claiming that her pre-arrest statement to the Alaska State Troopers should have been suppressed. The Ninth Circuit Court of Appeals held that the error (if error at all) was harmless beyond a reasonable doubt. Because Kwallek is seeking review of the Court of Appeals's harmless error determination, it is necessary to set forth the facts in some detail.

B. Factual Background

Bernard "Spade" Kwallek was shot five times in the chest, neck and head as he was leaving for work in Ketchikan, Alaska, on the morning of Thursday, June 24, 1982. One of the bullets entered his brain and was instantly fatal. Although there were no immediate suspects, suspicion later focused on the victim's wife, Patricia Kwallek. The following evening Patricia Kwallek was arrested on a charge of first-degree murder.

The Kwalleks lived in a two-bedroom home on Loop Road in Ketchikan, Alaska. Loop Road is a dirt road that stems off to the west from the North Tongass

Highway. The Kwallek residence is the first house on the right after one turns off the highway onto Loop Road. There is only one door to the residence. There is a wooden walkway leading from the door to the driveway, where Spade's pickup was parked. An oil tank sits on a wooden platform near the door to the residence.

One of Kwallek's neighbors, Lou Ann Cottle, was in bed studying on the morning of June 24, 1982. Sometime around 7:00 a.m. she heard three shots and a male voice shouting, "What are you doing, I haven't done anything." She heard a male voice say, "What's going on here," and then two more shots. Mrs. Cottle is not sure whether she heard one or two separate male voices. She did not hear anyone yelling "Patsy"; nor did she hear any female voices. Mrs. Cottle looked out the window, but she did not see or hear anything suspicious, such as a person running or a vehicle speeding away.

Deanna Cottle was also in bed on the morning of June 24th when she heard three shots being fired, then two more. Her bedroom window was closed and she did not hear any voices.

Another neighbor, Susan Novak, heard several shots while she was getting ready for work. Ms. Novak did not see or hear anything unusual other than the shots.

Harlan Heaton works in a building located across the North Tongass Highway from the Kwalleks. Mr. Heaton got to work at approximately 7:25 on the morning of June 24th. Shortly thereafter, he heard sirens; he did not hear any shots.

Gary Greg Boles lived on Loop Road and was working on his carport when he heard four shots. Twenty seconds later he heard two more shots. During this twenty-second interval, a man was screaming something to the effect of "Oh, my God" and "I didn't mean it." Mr. Boles heard only one male voice; he did not hear any female voices.

Loy Price was with Mr. Boles. Mr. Price heard three or four shots, one man screaming, and a couple more shots. He could not understand the words the man was screaming. Neither Mr. Boles nor Mr. Price saw or heard any people running away or vehicles speeding away. After hearing the second set of shots, Mr. Boles called the troopers.

Sylvia Andrew, the dispatcher for the troopers, received Mr. Boles's call at 7:28 a.m. A woman called in at 7:30. According to Ms. Andrew, had someone else also called to report the shooting while she was speaking to Mr. Boles, the call would have been transferred to one of the two remaining lines. The caller would not have gotten a busy signal.

When the emergency medical technicians arrived, Kwallek was on her haunches in the middle of Loop Road. Spade was lying near a small shed, flat on his back with his arms out. He was bleeding profusely.

Trooper Gorder was the first trooper to arrive at the Kwallek residence. The emergency medical technicians were attending to the victim; Kwallek, clad in an off-white robe, was leaning against the shed, watching. Trooper Gorder asked Kwallek what happened and she stated that she did not know. She explained that Spade had just left for work and she heard several "popping" sounds. When Spade screamed "Patsy" twice, she ran outside and found him lying by the shed. She did not see anyone in the area, nor did she hear any vehicles. She later repeated her story to Sgt. Rogers.

Sometime around 8:30 a.m. Kwallek signed a waiver of search form, giving her consent to a search of the residence. Shortly thereafter she dressed and went to the home of her friends, the Jencks.

The area surrounding the Kwallek residence was searched for a sniper. When no one was found, the troopers began searching for evidence. A .22 caliber shell casing with an "F" logo on it was found on the road. Three .22 caliber shell casings with "F" logos and a live bullet were found by the oil tank located near the only door to the Kwallek residence.

Numerous guns were found in a built-in gun cabinet in the Kwallek residence. The second bedroom was being used as a reloading and storage room. There the troopers found .22 caliber ammunition bearing an "F" logo.

Sgt. Lown searched the attic and found a .22 caliber semi-automatic rifle partially hidden under a box. He had gained access to the attic by pulling down a set of stairs from the ceiling of the reloading room. The rifle belonged to the Kwalleks and was usually kept in the gun cabinet near the door. There were two bullets in the rifle when it was seized. Subsequent testing established that the rifle was the murder weapon. The fingerprint lifts taken from the butt and forestock were not suitable for comparison purposes.

Sometime around 3 o'clock that afternoon, Sgt. Glass interviewed Kwallek at the Jenck residence. At that time he was not aware that the rifle had been found in Kwallek's attic. Kwallek's statement was similar to those she had given to Trooper Gorder and Sgt. Rogers, but it was more detailed. Kwallek explained that she had gotten up at about 6:30 that morning and fixed Spade his breakfast and lunch. She waved goodbye to him as he left for work sometime around 7:25. Then she heard popping noises and Spade screaming her name. She ran outside, found him lying by the shed and called the ambulance. The dogs were barking while she was on the phone. She also heard a "squeaky, creaky

bong" sound, which she could not identify. She had seen no one either inside or outside the house. She admitted that she and her husband had argued over finances and that he blamed her for failing to pay the rent for their boat stall on time.

On the following afternoon (June 25th), Sgt. Rogers picked up Kwallek at the Jenck residence and brought her to her home for an interview. She was interviewed in the kitchen by Sgt. Lown and Sgt. Glass. Eight minutes into the interview she was advised of her *Miranda* rights and executed a written waiver of those rights. Kwallek's version of the events of the morning of June 24th was substantially similar to the statement she gave to Sgt. Glass the previous afternoon, except that she claimed she had to dial twice for the ambulance. Kwallek also admitted that she had been in the attic recently and that she was behind on a lot of the bills, including the 1980 taxes. She kept many of these financial problems from her husband. She felt that when she finally told him about the money problems one of two things would happen -- Spade would get everything straightened out or they would go their separate ways. The attic door was opened twice during this interview, but Kwallek did not react.

Approximately 20 minutes into the interview, three other troopers entered the Kwallek residence to execute search warrants. These warrants authorized seizure of financial records, a sample of insulation from

the attic, and the off-white robe Kwallek was wearing when her husband was shot. Copies of the warrants were given to Kwallek, and Sgt. Lown told her what they were looking for. Sgt. Lown then explained that she had been formally served with copies of the warrants and that the other troopers would conduct the search. He then posed the following question, "Do you have any questions about that?" Kwallek responded, "No. I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sgts. Lown and Glass said nothing further about the search warrants, and switched the topic of conversation back to the events of the previous morning. They also questioned Kwallek about the unpaid bills. Kwallek explained that the bills had not been paid because there was no money to pay them. When asked where the money had gone, Kwallek told the troopers that she wanted to wait till her mother arrived because her mother could help. Kwallek's mother was due to arrive shortly, and Kwallek agreed to talk then. Sgt. Glass, after informing Kwallek that the other troopers would begin the search, asked her where the bank records and checkbook were kept, apparently to aid the troopers in locating the items listed on the warrant. Kwallek stated that her husband did not have a checking account and that she did not keep any books regarding household expenditures. When asked why she did not keep any records, Kwallek reiterated that she wanted to wait until

her mother got there. The interview was formally terminated at that time.

Kwallek agreed to accompany the troopers to the station and wait for her mother there. While Kwallek awaited the arrival of her mother, some of the investigating troopers and the district attorney met to discuss the case. At that time the decision was made to arrest Kwallek. Kwallek made no further statements to the troopers after she was placed under arrest.

The Kwallek residence was searched pursuant to the warrants. Various paperwork relating to the Kwalleks' financial condition (*e.g.*, invoices, bills, dunning letters, cancelled checks) were found wrapped in a yellow pillowcase in a dresser drawer. Kwallek's off-white robe was found underneath a pile of clean clothes lying on the bed. A search of Kwallek's purse revealed checks, a check, book, income tax forms, utility bills, savings statements, credit union statements, bills, invoices and past-due notices.

Kwallek's robe was sent to a crime lab for analysis. Lead residue was found on the sleeves and front surface of the garment. Substantial amounts of residue were found on the right sleeve. The pattern of residue found on the right sleeve was consistent with that which would be found if one were pulling the trigger of the murder weapon with the left hand.

Kwallek, who is left handed, was familiar with weapons.

According to the state's expert, it was unlikely that a person would pick up such lead residue by walking around in a reloading room because lead in a reloading room would be in a solid state. The residue found on the robe was gaseous residue which is generated when a weapon is fired. Moreover, if weapons had been fired in the reloading room and if Kwallek had then rubbed her sleeve in any residue which fell on a tabletop, there would be an obvious wipe mark, which was not found on Kwallek's robe.

At trial, the state hypothesized that Spade found out about the couple's financial problems, that the Kwalleks argued, and that when he left for work on June 24th, Spade either told Kwallek he was leaving her or that she had better be gone when he got home. In support of this theory the state presented evidence that the Kwalleks were substantially behind in their bills. In addition to the financial documents seized during searches of Kwallek's home and purse, there was testimony from several persons who had loaned Kwallek over $11,500.00. Although Kwallek tried desperately to hide their financial trouble from Spade, he had discovered the existence of two outstanding bills just prior to his death.

At trial, Kwallek proposed a "mysterious gunman" theory. Kwallek argued that someone had stolen the rifle from the Kwalleks' house, used it to kill

Spade, then hid it in Kwallek's attic. Kwallek had no idea who this mysterious gunman might be, or what his motive might be.

Kwallek's trial testimony relating to the early morning hours of June 24, 1982, was generally consistent with her earlier statements. She also suggested that the "squeaky, creaky bong" sound she had heard while she was calling for an ambulance was the sound of the attic stairs being pulled down.

Steven Neitzke also testified on Kwallek's behalf. Mr. Neitzke lived across the North Tongass Highway uphill from Mr. Heaton's shop. On June 24, 1982, Mr. Neitzke was awakened from a deep sleep by a woman screaming, two dogs barking, and two men shouting.

C. State Court Proceedings

Kwallek was indicted for murder in the first degree. Prior to trial, she moved to suppress her June 25th statement to Sgt. Lown and Sgt. Glass on the ground that it had been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). After an evidentiary hearing, the trial judge denied the motion, finding that Kwallek was not in custody during the interview. A jury subsequently found Kwallek guilty as charged.

Kwallek appealed her conviction to the Alaska court of appeals, raising numerous issues. That court affirmed in a per curiam unpublished opinion. *Kwallek v. State*, Alaska App. Memorandum Opinion No. 883 (July 24, 1985) [App. 53-92] With respect to the *Miranda* issue, the court concluded that Kwallek was not in custody at the beginning of the interview. The court assumed, without deciding, that the interview had escalated into a custodial interrogation at the time Kwallek was advised of her *Miranda* rights. Proceeding on this assumption, the court of appeals held that Kwallek's initial statement about wanting to talk to her mother was made in direct response to a question about the search warrants and, therefore, did not amount to an unequivocal assertion of the right to remain silent with respect to further questioning on other subjects. Kwallek's second statement about talking to her mother did, however, constitute an unequivocal assertion of the right to remain silent, requiring the cessation of all questioning. Applying the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), the court concluded that Kwallek had not been prejudiced by the admission of the few statements she made after this point. [App. 70-80]

Judge Singleton, in a concurring opinion, disagreed about the custody issue. He would have affirmed the superior court's finding that Kwallek was not in custody during the interview. Since Kwallek was not in custody, *Miranda* did not apply, and the troopers were

not required to scrupulously honor any invocation of the right to remain silent. [App. 85-86]

Judge Bryner dissented. He would have ruled that Kwallek's first statement about talking to her mother constituted an unequivocal assertion of the right to remain silent, and that the failure to suppress the remainder of the interview was not harmless. [App. 88-92]

On appeal, Kwallek argued for the first time that the admission of a transcript of the June 25th interview containing the statements about wanting to talk to her mother, as well as Sgt. Lown's trial testimony that the interview terminated when Kwallek said that she wanted to talk to her mother before finishing the interview, constituted impermissible comments on her right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). Because this issue had not been preserved in the trial court, the court of appeals applied the plain error standard of review under Rule 47(b) of the Alaska Rules of Criminal Procedure. It held that even if there were error, the error was not "obviously prejudicial". Given this holding, it was not necessary to reach the merits of the *Doyle* issue. [App. 80-82]

Kwallek petitioned the Alaska supreme court for discretionary review. After that court denied review, [App. 94] Kwallek petitioned this Court for certiorari.

That request was also denied. *Kwallek v. Alaska*, 475 U.S. 1108 (1986).

D. Federal Court Proceedings

Kwallek then filed a petition for writ of habeas corpus in the federal district court. The district court judge granted the petition, finding: (1) the state trial court finding that Kwallek was not in custody was not fairly supported by the record; (2) Kwallek's first statement about wanting to talk to her mother was ambiguous, and the troopers' failure to seek clarification required suppression of the rest of the interview; (3) the *Doyle* issue was adequately preserved in state court; and (4) the *Miranda* and *Doyle* errors were not harmless beyond a reasonable doubt. [App. 9-17]

The State of Alaska appealed to the Ninth Circuit. With respect to the *Miranda* issue, the State argued that the record fairly supported the state trial court's factual finding that Kwallek was not in custody, so the troopers were not required to scrupulously honor any assertion of the right to remain silent. Alternatively, the State argued that the presumption of correctness accorded state court findings under 28 U.S.C. §2254(d) applied to the Alaska appellate court finding that Kwallek's first statement about talking to her mother was limited to a discussion of the execution of the search warrants. Since this was a limited invocation of the right

to remain silent, the troopers did not violate *Miranda* when they questioned Kwallek about other topics.

With respect to the *Doyle* issue, the State argued that the federal courts should not consider the claim because Kwallek had not demonstrated cause and prejudice for her procedural default in state court. In making this argument, the State contended that the federal courts were bound by the state appellate court determination that Kwallek had not adequately preserved the *Doyle* issue under state law.

The Ninth Circuit Court of Appeals reversed the district court in an unpublished opinion. *Kwallek v. Endell*, Memorandum Opinion (May 18, 1989) [App. 1-8] The court did not decide the substantive issues raised in the State's brief, concluding that any error in the admission of Kwallek's June 25th statement and Sgt. Lown's testimony was harmless beyond a reasonable doubt. This conclusion was based on the strong evidence of guilt and the fact that Kwallek's "mysterious gunman" defense was implausible. The court wrote:

> The rifle which killed [Spade] Kwallek was found in the attic of the Kwalleks' home shortly after the shooting. Spent shells from the same rifle were found near the door of the residence, some distance from the site of the shooting. A state expert testified that the pattern of gaseous residue on

> Kwallek's robe was consistent with her having fired the murder weapon with the left hand. Kwallek, who is left-handed, is familiar with weapons. The state also presented substantial evidence of motive, including testimony to the effect that the Kwalleks' financial difficulties were a source of considerable marital friction.
>
> Finally, Kwallek's attempt to explain away this mass of circumstantial evidence was patently contrived. There is no plausible reason why the gunman, having shot her husband outside the house with one of the Kwalleks' rifles, would gather up the spent shells and leave them near the door, then go into the house, pull down the attic stairs and hide the weapon in the attic before fleeing without a trace. Similarly unconvincing was Kwallek's contention that the gunshot residue on her house robe was picked up off a table top, as there were no wipe marks on the robe.
>
> In short, the admission of the June 25 transcript was, if error at all, harmless.

[App. 3-4] Judge Reinhart dissented, disagreeing with the majority's conclusion that any error was harmless. [App. 5-8]

Kwallek now asks this Court to review the harmless error determination made by the Ninth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF HARMLESS ERROR IS FACT-BOUND; IT DOES NOT WARRANT DISCRETIONARY REVIEW BY THIS COURT

Kwallek argues that the Ninth Circuit Court of Appeals was wrong when it decided that any error in the admission of the transcript of the June 25th interview and Sgt. Lown's testimony that the interview terminated when Kwallek said she did not want to talk anymore until her mother arrived was harmless beyond a reasonable doubt. (Pet. at pages 18-23) This is nothing more than a request for this Court to re-weigh the strength of the evidence.

Contrary to Kwallek's assertion regarding motive, the State's evidence showing marital strife as a result of financial problems was strong. The State introduced evidence seized during searches of Kwallek's home and purse, which demonstrated that the Kwalleks were behind in paying their bills. Richard Stack also testified that he loaned Kwallek $10,000 in 1979; he did not tell Kwallek's husband about the loan because Kwallek had asked him not to. Approximately two months before the murder, Kwallek gave Stack a deposit slip for $10,000 and told him that she had deposited the money into his bank account. This was a lie; the deposit slip was actually for the business account of a friend of Kwallek.

Approximately two weeks before the murder, Mrs. Jenck loaned Kwallek $419 to pay her overdue utility bill and had not been paid back. Kwallek owed Mary Ann White over $600 for a bounced check and for one of Kwallek's utility bills which White had paid for Kwallek. Kwallek also owed a former employer $500 since November 1981.

Although Kwallek tried desperately to hide these financial troubles from Spade, he was beginning to find out about them. Mr. Enright's construction company did some work for Spade in 1982. Shortly before Spade's death, Mr. Enright asked Spade when Spade was going to pay the $2000 bill. Spade said he thought it had been paid and that he would talk to Kwallek about it. The Saturday before Spade's death, Spade discovered that his boat had been removed from his stall because the rent had not been paid. This news upset Spade.

The State also presented evidence that Spade did not believe in credit and was proud of the fact that he paid his bills on time. Although Spade was only 47, he had planned to retire soon, bragging that he had saved nearly $60,000. That money was not found.

Even if the evidence of motive was not as strong as in other cases, this does not undercut the Ninth Circuit's harmless error finding. Motive is not an element of first-degree murder under Alaska law. All the State was required to prove was that Kwallek intention-

ally caused Spade's death. The physical evidence that Kwallek was the killer was extremely strong: the murder weapon belonged to the Kwalleks; the weapon was found in the attic of the Kwallek residence shortly after the shooting; the sleeve of the robe Kwallek was wearing on the morning of the murder had a pattern of gunshot residue which was consistent with Kwallek having fired the murder weapon. The fact that the test for nitrites on the robe was negative was not surprising due to the fact that nitrites are easily oxidized by things in the air and on clothing, thereby making later detection impossible.

This fact-bound issue of harmless error does not warrant the exercise of this Court's discretionary review. The Ninth Circuit, in deciding that the error was harmless, did not decide new law; it simply applied the test set forth by this Court in *Chapman v. California*, 386 U.S. 18 (1967), to the facts of Kwallek's case.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Kwallek's argument that the Ninth Circuit's decision in her case conflicts with this Court's decisions in *Chapman v. California*, 386 U.S. 18 (1966) and *Fontaine v. California*, 390 U.S. 593 (1968), should be rejected. The fact that this Court found that the prosecutor's comments on the defendants' refusal to take the stand in those cases was not harmless error does not mean that there is no factual scenario in which such an error would be harmless. In fact, this Court in *Chapman* specifically declined to adopt a rule of automatic reversal. 386 U.S. at 22.

Kwallek's discussion focuses entirely on the strength of the evidence of guilt in *Chapman*. Noticeably absent from this discussion are references to a major difference in the two cases: the prosecutor's closing arguments. The appendix to this Court's decision in *Chapman* contains 17 pages of excerpts from the prosecutor's closing argument in which the prosecutor repeatedly referred to the fact that the defendants did not testify on their own behalf. The prosecutor also repeatedly asked the jury to draw adverse inferences from their failure to testify.

Kwallek's case is factually different. Kwallek voluntarily agreed to talk to Sgt. Lown and Sgt. Glass on

June 25th. She did not remain silent. Kwallek also testified at trial. She was not asked during cross-examination why she terminated the interview. The prosecutor, in closing argument, did not refer to Kwallek's desire to talk to her mother before proceeding with the June 25th interview, nor did she ask the jury to draw any adverse inference from Kwallek's statements about wanting to talk to her mother.

Moreover, the reference to Kwallek's decision to stop talking was brief. Sgt. Lown's statement that "Patsy didn't want to talk anymore" was one line in approximately 800 pages of transcribed testimony of 55 witnesses. It simply explained why the interview ended when it did. The 18-page transcript of the interview was one of 94 trial exhibits; the three statements about wanting to talk to her mother appear on pages, 14, 16 and 17.

In the context of Kwallek's case, even if it was error to admit admission of Sgt. Lown's isolated statement that the interview terminated because Kwallek didn't want to talk anymore, the error was harmless. *See e.g. Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir. 1988) (error harmless where references to the defendant's silence were brief and played a minor role in the government's presentation of its case); *United States v. Harrold*, 796 F.2d 1275, 1281 (10th Cir. 1986) *cert. denied*, 479 U.S. 1037 (1987) (harmless error where reference to the defendant's silence was an isolated

remark in a two-week trial); *Hobbs v. Lockhart*, 791 F.2d 125, 130 (8th Cir. 1986) (error harmless where there was no repetitive questioning regarding the defendant's silence and the prosecutor did not attempt to highlight the evidence in argument); *United States v. Shaw*, 701 F.2d 367, 383 (5th Cir. 1983) *cert. denied*, 465 U.S. 1067 (1984) (error harmless where the prosecution did not highlight the evidence of defendant's silence or refer to it in closing argument).

III. THERE IS NO NEED TO CLARIFY THE LAW

Kwallek urges this Court to grant certiorari to decide the issue left open in *Greer v. Miller*, 483 U.S. 756 (1987): whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, the standard should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt. This case is not an appropriate case to decide that issue for two reasons.

First, the issue is not really presented in this case. As discussed in the statement of the case, Kwallek did not raise the *Doyle* issue in the trial court. The Alaska court of appeals, applying the "plain error" standard of review, concluded that the reference to Kwallek's statements about wanting to talk to her mother was not "obviously prejudicial". Since Kwallek did not properly preserve the *Doyle* issue in the state trial court, the Ninth Circuit should have required her to demonstrate cause and prejudice for her procedural default. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). At the very least, the Ninth Circuit should have applied the "plain error" standard of review. *Cf. United States v. Young*, 470 U.S. 1, 15 (1985) (plain error standard of review applies on appeal when defendant failed to comply with contemporaneous objection rule).

Instead, the Ninth Circuit applied the strictest standard of harmless error review -- "harmless beyond a reasonable doubt" -- and still affirmed Kwallek's conviction. Because the Ninth Circuit used the test most favorable to Kwallek, the conclusion of harmless error will be the same even if this court holds that the test is whether the error "substantially affected" the course of the trial, or that Kwallek was required to demonstrate cause and prejudice for her procedural default. Thus, this legal issue is moot in Kwallek's case.

CONCLUSION

Kwallek's petition for writ of certiorari should be denied.

Respectfully submitted this 15th day of December, 1989.

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Supreme Court, U.S.
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DEC 27 1989
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No. 89-511

In The

Supreme Court of the United States

October Term, 1989

PATRICIA KWALLEK,

Petitioner,

vs.

ROGER ENDELL, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, and HAROLD BROWN, ATTORNEY GENERAL OF THE STATE OF ALASKA,

Respondents.

REPLY BRIEF OF PETITIONER PATRICIA KWALLEK

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ARGUMENT

THIS CASE SHOULD BE USED TO CLARIFY WHEN PROSECUTORIAL COMMENT ON A DEFENDANT'S EXERCISE OF FIFTH AMENDMENT RIGHTS CONSTITUTES REVERSIBLE ERROR.

A. The "Impermissible Comment" Argument Was Presented to, and Considered by, the State Courts.

At page 24 of its brief, the State argues that Mrs. Kwallek did not properly preserve her "impermissible comment" argument in the state trial court and the Ninth Circuit, therefore, should have required her to demonstrate "cause and prejudice" for her procedural default under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In response, Mrs. Kwallek offers the following. First, whether Mrs. Kwallek properly preserved the "impermissible comment" issue in the state courts is not properly before this court. Since the Ninth Circuit rested its decision entirely on "harmless error" grounds, the preservation issue is not yet ripe for review.

Second, as explained at pages 7-8 of Mrs. Kwallek's petition, the impermissible comment argument *was* properly submitted to the trial court in the form of a pretrial motion to suppress. Had the trial court agreed with Mrs. Kwallek's analysis, it would have been required by *Miranda v. Arizona*, 348 U.S. 436 (1966), to suppress not only the substantive portion of the statement, but also those portions where Mrs. Kwallek had invoked her right to silence. *Id.* at 384 U.S. 468, n. 37. Since Mrs. Kwallek's *Miranda* motion was denied, the entire statement – including Mrs. Kwallek's repeated requests to break off the interview – was presented to the jury.

Both Magistrate Jamin and District Court Judge Holland agreed that Mrs. Kwallek had properly preserved the "impermissible comment" argument at the trial level. (App. 16; 49-50.) The District Court specifically held "that petitioner sufficiently raised to the trial court, and the appellate in fact considered, the merits of the question of whether or not the transcript of petitioner's interview should be redacted so as to delete questions and answers concerning her right to remain silent." (App. 16.) This conclusion was never challenged by the Ninth Circuit.

Third, in any event, since the Alaska Court of Appeals squarely addressed the merits of the "impermissible comment" argument while conducting its plain error analysis, that court's determination on the merits of the issue is subject to later *habeas* review by the federal courts. *Walker v. Endell*, 850 F.2d 470, 473-474 (9th Cir. 1988); *cert. den.*, 109 S.Ct. 309, 530; 102 L.Ed.2d 328, 562 (1988) (where the Alaska Court of Appeals considers the merits of a federal constitutional argument in conducting a plain error analysis, that issue may be raised in a federal *habeas* proceeding); *Huffman v. Ricketts*, 750 F.2d 798, 800-801 (9th Cir. 1984). This was the conclusion reached by the District Court. (App. 16.)

In light of the foregoing, the State's suggestion that Mrs. Kwallek did not properly preserve certain arguments in the state courts is a red herring. The only issue presented to *this* court is whether the Ninth Circuit properly determined that the constitutional violation, if it occurred, was harmless error.

B. In Light of *Greer v. Miller*, This Court Should Clarify the Harmless Error Standard in Cases Involving an Impermissible Comment on the Defendant's Decision to Remain Silent.

The State correctly points out that the Ninth Circuit purportedly applied the "harmless beyond a reasonable doubt" standard to the constitutional violation which tainted Mrs. Kwallek's trial. The State then concludes that whether a lesser "substantially affected the course of the trial" standard should apply in *habeas* cases (the issue left open in *Greer v. Miller*, 433 U.S. 756 (1987)) is a moot question.

Again, Mrs. Kwallek has several responses. First, should the court grant the petition, presumably the entire issue of when *Doyle*[1] violations constitute reversible error in *habeas* cases would be ripe for consideration. Thus, the issue left open in *Greer* could be decided.

Second, apart from the narrow issue left open in *Greer*, it is evident by the varying approaches taken by members of this court in that case that there remains sharp disagreement as to what circumstances constitute reversible error in a *Doyle* case. Since this general issue is squarely presented in this case, granting the petition would offer the court an excellent opportunity to fully address the question.

Third, like this court, the lower courts have been struggling with the effect of *Doyle* violations. In *Greer*, for example, the state and federal judges who considered whether the *Doyle* violation constituted reversible error

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[1] *Doyle v. Ohio*, 426 U.S. 610 (1976).

reached widely varying conclusions.[2] The same thing happened here. On the state side, the trial court found in favor of the state; the Alaska Court of Appeals affirmed the conviction in a split 2-1 decision; and the Alaska Supreme Court denied Mrs. Kwallek's petition for hearing on a 3-2 vote. On the federal side, the federal magistrate and district court judge found in favor of Mrs. Kwallek. On appeal, a sharply divided panel of the Ninth Circuit reversed and reinstated the conviction.

With this much judicial disagreement afoot, the time has come for a post-*Chapman*[3] case to further clarify the circumstances under which state violation of a defendant's right to silence can constitute reversible error. The present case presents an excellent vehicle for a full discussion of this issue. The case dovetails nicely with *Greer*, where the prosecutorial comment was brief and immediately cured by a prompt instruction from the court. In contrast, here, the improper evidence included an exhibit submitted to the jury which demonstrated that, when pressed for incriminating details, Mrs. Kwallek

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[2] The state trial court did not believe that the prosecutor's improper question warranted a mistrial. The Illinois Court of Appeals disagreed, reversing the conviction. The Illinois Supreme Court disagreed with the Illinois Court of Appeals and reinstated the conviction. On *habeas* review, the Federal District Court agreed with the Illinois Supreme Court and denied the *habeas* petition. A divided Seventh Circuit Court of Appeals, in turn, reversed the District Court and vacated the conviction. Here, still another divided court reversed yet again and reinstated the conviction. *Greer v. Miller*, 483 U.S. at 759-761.

[3] *Chapman v. California*, 386 U.S. 18 (1967).

repeatedly attempted to break off the interview. The resulting prejudice was exacerbated by Sergeant Lown's trial testimony that "Patsy didn't want to talk anymore."[4] Further, unlike *Greer*, there was no prompt curative instruction. Thus, while *Greer* may present a situation where no *Doyle* violation occurred, the present case demonstrates where it constitutes reversible error.

CONCLUSION

As is evident by the procedural histories of *Greer* and the present case, few issues divide the judiciary as sharply as the circumstances in which a *Doyle* violation constitutes reversible error. By accepting Mrs. Kwallek's petition, the court could go a long way toward clarifying the issue for the lower courts.

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[4] The State points out that the transcript was "one of 94 trial exhibits," suggesting that it would not have been seriously considered by the jury. The State's argument is disingenuous. Surely, in a first-degree murder case, the jury would pay particularly close attention to a transcribed interrogation session of the defendant taken the day after the murder. The same holds true for the testimony of Sergeant Lown. Lown was the chief investigating officer assigned to the case; was the State's most important witness; and was on the stand longer than any other witness during the trial.

For all of these reasons, Mrs. Kwallek respectfully requests that her petition for writ of certiorari be granted.

DATED this 27th day of December, 1989, at Anchorage, Alaska.

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